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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. _____

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

Sub nom. NEWTON B. SCHWARTZ, P.C., ET AL
and JOHN M. O'QUINN, P.C., ET AL,
Petitioners

v.

DAVID DEAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. The District Court having found that the consensual fee sharing Agreement ("Agreement") entered into in December of 1983, as amended in December of 1984 among the nine member Plaintiffs' Management Committee (PMC) in the multi-district "Agent Orange Product Liability Litigation" was valid and should be enforced, did the Court of Appeals, upon appeal of the District Court's Order by one of the members of the PMC, "Dean", err in reversing the holding of the District Court by holding that:

(1) Said fee sharing agreement was invalid and should not be enforced in view of its potential for creating conflict between counsel and members of the class?

(2) Said "Agreement" violated 'established principles' governing awards of attorneys fees in such cases?

II. Did the subject fee sharing agreement violate any rules of ethics so as to require judicial intervention rather than abstention?

III. Did Dean lack standing to challenge the "Agreement" among the nine constituent members of the PMC which he promoted, solicited and agreed to on grounds of estoppel, and lack of clean hands in equity to have standing to challenge his own "Agreement"?

IV. Was the "PMC" a *de facto* ad hoc law firm as determined by the District Court for the purpose of allocation of fees among the constituent members of the PMC?

V. Was Rule 23(a) Federal Rules of Civil Procedure violated by the District Court's upholding the validity of the fee sharing class which did not adversely affect the distributable awarded class funds?

VI. Did the Court of Appeals err in rejecting the "clearly erroneous" standard of review of *Lindy II* and in imposing its "de novo" review of the findings of the District Court in this class "equitable fund doctrine" case?

VII. Did the Court of Appeals err in its holding that this class litigation was not of the type that was to be encouraged policywise when it involved the very conduct of the Vietnam War and the decision to defoliate the jungles with Agent Orange dioxin, a principal issue in the 1964 presidential election and is still newsworthy 23 years later, because it presented difficult legal obstacles?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable Supreme Court of the United States:

Petitioners NEWTON B. SCHWARTZ, P.C., a Texas Professional Corporation and its three constituent members, Newton B. Schwartz, Barry S. Berger and Martin M. Nathan and JOHN M. O'QUINN, P.C., a Texas Professional Corporation and JOHN M. O'QUINN, an individual Texas lawyer, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit decided on April 21, 1987. It reversed the orders of the United States District Court for the Eastern District of New York

which upheld a fee sharing agreement signed by all members of the Agent Orange Plaintiffs' Management Committee (hereinafter "PMC"). Motions for Rehearing and Rehearing En Banc were denied on July 1, 1987.

This case involves important questions as to attorneys fees awarded under Rule 23(e) FED. RULES CIV. PROC. under This Court's "equitable fund doctrine" and Agreements promoted by Respondent David J. Dean, a New York lawyer, ("DEAN") in which he represented as an inducement to participate that each participating attorney would receive a 3-1 return on contributions expended in the successful prosecution of the lawsuit on behalf of the class. Dean later reneged after the settlement of the class action for $180,000,000.00 and the award of $4.7 million dollars to the class attorneys. There was no impact upon the class as to such total for attorneys fees under the Agreements, but only upon Respondent DEAN* who induced all other class attorneys to participate based upon his representations. The difficult class action was settled on the eve of trial after extensive discovery and substantial efforts of time, talent and energy and commitment of resources by the "PMC" against formidable opponents, well financed, and overcoming difficult legal obstacles.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit reversing that of the District Court is reported at 818 F.2d 216 (2nd Cir. 1987) (and its related opinion affirming in part and reversing in part regarding award

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* The other two members of the PMC affected, Schlegel and Musslewhite did not renege on the "Agreement" although substantially affected. See illustrative chart at page 8, *infra*.

of attorneys fees to the class is reported at 818 F.2d 226 (2nd Cir. 1987). They are attached hereto in the appendix respectively marked Exhibits "A" and "B". Motions for Rehearing and Rehearing En Banc were denied on July 1, 1987. Attached hereto as Exhibit "D".

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgments on April 21, 1987. It denied Petitioners' timely Motions for Rehearing on July 1, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) et seq.

STATEMENT OF THE CASE

Petitioners NEWTON B. SCHWARTZ, P.C., a Texas Profession Corporation and its constituent members, Newton B. Schwartz, Barry S. Berger and Martin Nathan and JOHN M. O'QUINN, P.C., a Texas Professional Corporation and JOHN M. O'QUINN, an individual Texas practitioner with associates, are two constituent members of the nine-member Plaintiffs Management Committee ("PMC") which included Respondent "DEAN" and seven other members of the "PMC". David Dean, a member of the PMC, appealed the holding of the District Court which found that the fee sharing agreement entered into by the nine constituent members of the PMC, including David Dean, in December of 1983, (as revised and amended in December of 1984) was valid, and should be enforced. The Court of Appeals reversed the District Court holding that the fee sharing agreement under which six of nine members of the PMC including Petitioner who agreed to advance funds for litigation and receive a threefold return on said advancement of funds to be paid out of the total 'pot' of legal fees awarded the nine

constituent members of the PMC by the District Court out of the total class settlement funds, was invalid and should not be enforced, *inter alia,* because of its *potential* (all emphasis added) for creating a conflict between counsel for the class and the class itself.[1]

Petitioners, members of the nine member PMC, are adversely affected by the holding of the Court of Appeals since they are denied the benefit of its agreement among the nine-member PMC which was not only agreed to by Dean ("Respondent") but was also promoted and solicited by him. The agreement among the nine-member PMC did not affect the class nor the settlement funds allocated to the class (out of which all attorneys fees and expenses for all attorneys representing the class and individual members thereof were awarded by the District Court).

As pertains to this appeal,[2] a consortium of New York lawyers commenced this litigation in 1979 under the helm of Victor Yannacone, known as Yannacone & Associates (hereinafter "Y&A"). Respondent ("DEAN") was a member of that consortium at all times to September 1983 when "Y&A" withdrew as class attorneys for the class.[3]

The class included all Vietnam war veterans and their families who were exposed to the defoliant Agent Orange

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1. Significantly the other three non-contributing members, including "Dean" were to receive a 3-1 investment multiplier on their usual litigation costs (up to $50,000 base each or ×3=$150,000 each) the six contributing members were not to receive such 3-1.

2. The procedural background and history of this litigation is set forth at 818 F.2d 145 et seq.

3. Petitioner Schwartz was initially a member but withdrew in 1981 over conflicts and differences with "Y&A" as to overall management, direction and other details.

while in the armed forces, and their families, wives and children, who were injured, harmed and damaged as a consequence, including children not yet conceived or born.

The withdrawal of "Y&A" was based upon financial hardships and the consequent management problems ensuing. It simply was out of funds and could not proceed with even the basic taking of further depositions because of lack of funds and manpower. A reconstituted Agent Orange Plaintiffs' Management Committee ("PMC") was initially appointed, consisting of Benton Musslewhite, Stephen Schlegel and Thomas Henderson. Later that fall, 1983 six additional members were appointed by the Court, including Petitioners and Respondent Dean. *In Re Agent Orange Product Liability Litigation,* 571 F.S. 481 (E.D. N.Y. 1983).

Prior to the execution of the original "PMC" Agreement in December, 1983 Newton B. Schwartz in September 1983 personally advised Special Master Sol Schreiber (appointed by then Presiding Judge George C. Pratt then a District Judge and thereafter appointed Judge, U. S. Court of Appeals for the Second Circuit) that:

1. Dean was soliciting funds from prospective counsel offering multipliers from 2-1 to 4-1 for funds contributed to further the litigation and that a 3-1 return on the contributions in addition to the usual "equitable fund" hourly fees, and multiplier, if any, was finally agreed upon as of September 1983.

2. That no services at all need to be performed by contributors in the litigation in order to qualify for this contribution of funds.[4]

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4. See e.g. affidavit executed by Newton Schwartz May 31, 1985 and filed in the Trial Court papers June 4, 1985. Document No. 6276 at pp. 8-10. Appendix, Exhibit "C" attached hereto.

3. But that contributing counsel could participate as fully as they wished.

Schreiber vetoed such suggested disclosure to Judge Pratt and "Dean" concurred in this nondisclosure.

Petitioner and five of the other members of the "PMC" (out of nine total) immediately began the infusion of capital and their time, talent and energies into the active litigation discovery and hearings in October, even before the December 7, 1983 execution (as of October) Agreement which Dean personally created, promoted, solicited the final 3-1 return on contribution as well as the participation of counsel.[5] He did so as Court designated lead counsel responsible for the preparation of the Plaintiffs case.

The original formula unanimously agreed upon provided, *inter alia:*

1. Threefold reimbursement for each $200,000.00 contribution, from the pool of attorneys fees;
2. After such distribution, 50% of the remainder would be distributed equally among the nine PMC members;
3. Then a 30% distribution according to the number of hours each member expended;
4. The remaining 20% in accordance with certain quality and risk factors.

The Court of Appeals opinion is premised on the totally incorrect assumption that there was no disclosure of this Agreement. While none was apparently made to Judge Weinstein, who replaced Judge Pratt in October 1983, it ignores the undisputed disclosure to Special Master

5. *Id.* at pp. 8-10.

Schreiber in September 1983 even before its execution. On May 7, 1984, the day set for trial, after extensive, exhaustive around the clock discovery, nationwide and internationally, and the expenditure of more than $2 million in fresh funds, a settlement was obtained for the class for $180,000,000.00. This despite substantial defenses raised, including that of the "government contractors" defense, which contended that if the Defendant chemical companies produced Agent Orange, a dioxin, in accordance with U. S. Government specifications, it was absolved from further liability even to the ultimate users, and those who were exposed to it, *i.e.*, the Plaintiffs herein.

On June 11, 1984 the District Court ordered that Petitions for attorneys fees were to be submitted by August 31, 1984. A fee hearing was scheduled for September 1984 but no notice was given to the class because of the "need for continued intensive work by the attorneys until the close of the fairness hearings and . . . the complexity of the fee application". Although his predecessor, through Special Master Schreiber at least constructively knew of the "3-1" provision for return on contributions, Judge Weinstein evidently was not so informed until the PMC did so when it submitted its Joint Fee Petition. After Judge Weinstein questioned the Agreement, the PMC members modified the original agreement. The original Dean-proposed 3-1 return on contributions was retained, with the amount of five individual members' contributions increased to $250,000.00 each.[6]

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6. The Sixth member Thomas Henderson contributed $200,000.00; each of the three non-contributing members, including Respondent Dean, received a 3-1 multiplier up to $50,000.00 each on their general litigation expenses; the contributing PMC members did not receive any multiplier on their general litigation expenses. *Agent Orange I*, 611 F.Supp. at 1454.

The remaining fees were to be distributed *pro rata* to each PMC member "in the proportion the individual's and/or firm's fee award bears to the total fees awarded". *Agent Orange I,* 611 F.Supp. at 1454.

As amended, the final fee award by the District Court awarded:

1. Approximately $4.7 million to the nine PMC members on an individually apportioned basis;

2. The amount awarded by the District Court to each of the nine PMC members, the amount of fees awarded under the amended Agreement and the net effect of the agreement are correctly set forth below (*see* fn. 2, 818 F.2d 216 at 220-221.)

	Amount of Fees Awarded by District Court	Amount of Fees Awarded Under The Agreement	Net Effect Of The Agreement
Dean (noninvestor)	$1,424,283	$542,310	- $881,973
Schlegel (noninvestor)	$ 944,448	$393,312	- $549,136
Musslewhite (noninvestor)	$ 344,657	$206,991	- $137,666
Schwartz (investor)	$ 41,886	$513,026	+$471,140
O'Quinn (investor)	$ 132,576	$541,128	+$408,552
Brown (investor)	$ 348,331	$608,162	+$259,831
Locks (investor)	$ 487,208	$651,339	+$164,831
Chesley (investor)	$ 475,080	$647,534	+$172,456
Henderson (investor)	$ 515,163	$659,975	+$144,812

The total of all fees awarded by the District Court to the members of the PMC remained unchanged.

In May of 1985 Dean moved to overturn the fee sharing agreement, claiming that it violated professional ethics and did not protect the rights of the class. After hearing argument and testimony by expert witnesses including Professor Arthur Miller, Petitioners' expert in the matter, the Court in Memorandum and Order issued June 27,

1985 denied Dean's Motions and upheld the Agreement. The District Court found, *inter alia,* that:

1. No conflict of interest had arisen in the litigation from the fee sharing agreement; and

2. The interests of the class in obtaining a fair and reasonable settlement had not been impinged. *Agent Orange I,* 611 F.Supp. at 1461.

3. That the PMC was an *ad hoc* law firm "formed for the purpose of prosecuting the Agent Orange multidistrict litigation" *Agent Orange I, Id.* at 611 F.Supp. at 1458; therefore, the business realities required the PMC to perform all functions of a law firm including the allocation of fees among its members. This satisfied DR 2-107A;

4. As to DR 5-103 which prohibits an attorney from acquiring a proprietary interest in an action in which he is involved, the District Court held that the contributing members acquired no independent interest in the action because the financial return from any initial advance for expenses was to be paid from the fees otherwise awarded to the PMC members and thus would not affect the class fund. While acknowledging that a conflict of interest was possible, it held that complex class actions require more sophisticated analysis of ethical codes than ordinary two party cases in order not to "unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class." *Id.* at 1460.

Any theoretical incentive to settle early: (1) did not occur here, because there was never any settlement offer or meaningful discussion until the weekend of May 5-6,

1984 preceding the May 7, 1984 trial date; and (2) it would be offset by the counter balancing theoretical incentive to extend such litigation created by the lodestar formula; and (3) the 3-1 multiplier applied, "whether the case is settled today or five years from now." *Id.* at 1460.

Additionally the Court set forth five additional reasons for approving the Agreement at issue:

1. The returns on the contributions did not affect the class fund, since they were paid from the fee awards of PMC members;

2. The "business" of law will require creative, yet ethical methods for economical and efficient operation;

3. Without the funds advanced by the PMC, the litigation would have collapsed and neither the attorneys nor the class would receive *any* payments." Nor would there be any return on past, present or future investments if the case were lost, initially or after any appeals were exhausted; such was the high risk of time and funds;

4. The same $250,000.00 contributions could have been advanced by the contributing PMC members in safe investments yielding substantial returns;

5. If the PMC members had received their requested $30 million in fees, the extent of the mathematical distortion would have been insubstantial.

The District Court, evidently unaware of the earlier disclosure to Special Master Schreiber, cautioned that in all future cases, such agreements should be disclosed at the time of its formation, which is precisely when it was done in this case in September 1983.

SUMMARY OF THE ARGUMENT

The Agreement(s) here did not affect, one iota, the class' recovery. The original was proposed by Dean as a necessary inducement to capable, resourceful, experienced[7] counsel enter prolonged litigation which was highly risky and speculative as later found by the Courts below. To secure advancements for litigation costs in such a venture, substantially more than the usual formulae, of hourly rate, under traditional lodestar formulae even with potential traditional multiplier for quality work and the risk undertaken,[8] was essential to induce any contributing attorneys willing to commit their time, talent, energies and resources, whether cash or loan commitments by them, to such difficult litigation. Here, unlike all other known reported class actions, the ratio of litigation costs expended and incurred to the date of trial ($2.3 million) were nearly ½ of the fees awarded.

No case has as a matter of public policy more reason to be prosecuted than this one. The political fallout from our country's involvement in the Vietnam war continues even though that war ended in 1976. Yet, for the nearly 250,000 (¼ million) veteran claimants here involved, and particularly those affected, actual or supposedly, by the toxic chemical dioxin, Agent Orange, more than their cherished monument in Washington and current best sellers and hit movies about such war, they would have

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7. The average number of years experience in the tort field of the nine constituent members of "PMC" exceeded twenty years. All were successful, active trial lawyers.

8. As encapsulated most recently in this Court's decision in *Pennsylvania v. Delaware Valley Citizens Council*, _____U.S._____, 106 S. Ct. 3088, 3098 (1986). Unlike that case, here there was no "usual fee shifting statute" involved.

their vindication or "day in court" entitlement to a public airing of the national policy involved. This is buttressed by the fact that today, 11 years after the end of the war, there are two movies depicting such war among the current best attended and rated critically in the U.S., "Platoon" and "Full Metal Jacket".

Dean knew the monumental risks in continuing such litigation. He offered 3-1 because this is what he knew it would take in the market place to arouse serious consideration on such a risky commitment to a required combination of capable, experienced and affluent trial litigators.

Having so represented such agreement to induce his fellow PMC members, is he not now estopped to deny such agreement's validity or to seek to set aside his own Agreement, on both legal and ethical as well as moral grounds?

The PMC was in fact an *ad hoc* law firm. It opened its own law office in Brooklyn, New York and staffed it with its repective members. Fee sharing agreements under such circumstances are permissible just as they would be among members of the same law firm.

Likewise, the members of the PMC who contributed at the time, initially almost $1.5 million dollars and incurred substantial additional debts for which they are personally liable and more than that in their time and substantial general litigation expenses without any multiplier, such as the 3-1 contracted to be awarded to the three non-contributing members.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals below and *Grinnell I and II*[9] conflicts with that of the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973), on remand, 382 F.Supp. 999 (E.D. Pa. 1974), appeal after remand 540 F.2d 102 (3rd Cir. 1976 *en banc*) (hereinafter *Lindy I and II* respectively) and decisions of the District Courts in the Second, Third and District of Columbia Circuits permitting and approving private fee sharing agreements, even in lump sum awards, to class counsel in an equitable fund action under the lodestar approach;

2. The Court below under Fed. R. Civ. P. 23(e) pronounced the death knell for obtaining competent class counsel in erroneously holding that the District Court's role was not properly satisfied as protector of the class in holding hearings, and determining reasonableness in the awarding of fees under the Agreement in this equitable fund case;

3. The Court of Appeals erroneously held that this Agent Orange class action was not the type, which as a matter of policy, was worthy of judicial encouragement in view of the high risks involved in its prosecution and defenses available thereto.

4. The Court of Appeals main premise, *i.e.*, lack of disclosure, fails factually because Petitioners here informed the Special Master of the proposal to share attorneys fees during the agreement's formulative stages, including the

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9. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *on remand*, [1976-1] Trade Cas. (CCH) ¶ 60,913 at 68,980 (S.D. N.Y. 1976), *appeal after remand*, 560 F.2d 1093 (2d Cir. 1977).

3-1 return on contributions, and requested to inform the then presiding Judge of such action, which was vetoed; yet Petitioner and all other signatories except Dean* are now penalized and have had their voluntary agreement nullified by the Court of Appeals' refusal to acknowledge such uncontroverted disclosure.

5. Erroneously, in the name of ethics, the Court of Appeals has rewarded the very wrongdoer co-counsel, Dean, who conceived, initiated, promoted and benefitted[10] most from their Agreement on tenuous theoretical ethical grounds while rejecting out of hand (Dean's) fraud in the procurement of the agreement by promises of the very 3-1 return on investment now condemned by Dean and the Court of Appeals; he is estopped from denying the same on legal grounds and his procurement and participation in the same and on equitable grounds by reason of his lack of clean hands and hence standing to challenge his own procured agreement.

6. If the opinion below is allowed to stand, it will preclude all future agreement between counsel respecting mass toxic tort class actions and such have such a chilling effect as to eliminate competent counsel from such cases in the future, capable of prosecuting such litigation.

7. Ignoring such "clearly erroneous" standard, the Court of Appeals here disregarded such detailed, pains-

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* See page 2 footnote.

10. Dean had substantial time in the case which he most certainly would lose unless he could induce Petitioners and others to enter the case and assume the financial and a substantial part of the work burden. A sizable portion of the fees he has been awarded is for this time that would have been clearly lost but for the contributions of Petitioners. There are no just reasons that he should get the fruits of the agreement and Petitioners the pits.

taking findings of the District Court and erroneously substituted its judgment without regard to the facts extant, *de novo;* hence its legal conclusions are incorrect.

DISCUSSION

The Court of Appeals for the Third Circuit in a similar class action situation held that (on remand) in an antitrust case that the internal agreement of counsel was "simply irrelevant" where the award otherwise conformed with this Court's criteria in "equitable fund" doctrine cases first pronounced in *Trustees v. Greenough,* 105 U.S. 527 (1882) and *Central Railroad & Banking v. Pettus,* 113 U.S. 116 (1885):

> "Finding the basic facts not clearly erroneous, and determining that there is no error in the Court's reasoning or in its application of the proper legal precept, we affirm the district court on this point (whereby a law firm ("Berger") was awarded $893,-500 under a fee sharing agreement instead of the $139,186.85 found under the District Court's hearing for reasonable value for contributing materially to the creation of the settlement fund). Implicit in this conclusion is the understanding that the agreement between Kohn and Berger to *split fees is simply irrelevant to the considerations mandated by Lindy I* (emphasis supplied). *Lindy II,* supra, 540 F.2d at 109.

Case law subsequent to *Lindy II* demonstrates that in the class action context, District Courts wisely encourage the court-awarded fee to be allocated by counsel. *See, e.g., Ruskay v. Jensen,* No. 71 Civ. 3169 (S.D. N.Y. Sept. 18, 1981) (available on LEXIS, Genfed library); *In Re Magic Marker Securities Litigation,* [1979-1980]

Fed. Sec. L. Rep. (CCH) ¶ 97,116 at 96,195 (E.D. Pa. 1979); *Valente v. Pepsico, Inc.*, [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,921 at 95,863 (D. Del. 1979), *appeal dismissed*, 614 F.2d 772 (3rd Cir. 1980); *Del Noce v. Delyar Corp.*, 457 F.Supp. 1051, 1053 (S.D. N.Y. 1978); *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C. 1978).

As Judge Brieant noted in *Del Noce v. Delyar Corp.*:

> "Counsel have, to an extent, simplified this Court's work in fixing fees here by agreeing together that a single fee shall be awarded, based on the total of the services rendered, which counsel will divide among themselves by private arrangement as if they were law partners, or joint venturers as to this particular piece of business. Accordingly, the Court is concerned only with the fairness and propriety of a single amount, to be fixed by the Court in accordance with the traditional principles of *quantum meruit* and in compliance with *Grinnell I and II*, just as if all the services had been rendered by a single law firm." 457 F.Supp. at 1055.

The justification for allowing the attorneys who have functioned as an *ad hoc* law firm representing a class to allocate a fee among themselves is straightforward, *i.e.*, "it is virtually impossible for the Court to determine as accurately as can the attorneys themselves the internal distribution of work, responsibility *and risk*." *In Re Ampicillin Aantitrust Litigation*, 81 F.R.D. at 400 (emphasis supplied).

This issue has not been decided by this Court as to either the methodology for awarding attorneys fees in common fund cases, nor under what circumstances private

agreements of such counsel will be respected and honored. Nor has the Court decided the ethical considerations here involved, nor the concomitant issue of whether the very counsel who promoted such 3-1 inducements can later renege on his very own agreement after capitalizing upon the resources, time, talents and energies expended by his own selected co-counsel, itself an important question of ethics, as is that of the Court of Appeals rewarding a wrongdoer and one lacking clean hands. That is whether or not "Dean" has standing to raise the issue under the equitable doctrine of "common fund" situations.

In fact the Court of Appeals for the Third Circuit itself has in the past properly discussed three factors to be considered by the District Courts in increasing the lodestar:

> "1. Analysis of Plaintiff's burden. . . .
>
> 2. *Risks assumed in developing the case.* This category subsumes consideration of: (a) the number of hours of labor risked without guarantee of remuneration; (b) *the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.;* (c) the development of prior expertise . . .
>
> 3. The delay in receipt of payment for services rendered." 540 F.2d at 117 (emphasis supplied).

The italicized language demonstrates that a District Court may increase the lodestar, *i.e.*, apply a multiplier, *based upon the advancement of costs of the litigation.* This is precisely the effect of the 3 for 1 multiple contained in the fee-sharing agreement approved by Judge Weinstein.

The District Court recognized that without the agreement the very continuation of the litigation was in doubt and the $180 million settlement would not have been created. Implementation of the Agreement does not conflict with any common fund decision. Indeed, its result is well-supported by existing case law.

PERFORMANCE OF THE FEE-SHARING AGREEMENT DOES NOT VIOLATE ETHICAL STANDARDS

A. There Has Been No Improper Sharing Of Fees.

The District Court, looking both to DR 2-107(A) of the American Bar Association Code of Professional responsibility and Rule 1.5 of the more recently enacted American Bar Association Model Rules of Professional Conduct, had little difficulty rejecting Dean's argument that the fee sharing agreement violated ethical standards regarding the division of fees among attorneys. Judge Weinstein found that ethical restrictions did not control the present case because the PMC was "an *ad hoc* law firm, a joint venture formed for the purpose of prosecuting the Agent Orange multidistrict litigation." 611 F.Supp. at 1458. Such a factual finding is clearly supported by the record.

A major portion of the sums advanced by the members of the PMC paid the costs of operation of a separate law office located in Brooklyn near the District Court which was essential to the prosecution of the class action. Such expenses included rent, furniture and office equipment, payments to the office staff, telephone, photocopying expenses and computer services. *See* Judge Weinstein's main

opinion regarding fees and expenses, 611 F.Supp. 1296, 1330-31. Although the PMC was a joint venture for the prosecution of a single case, these expenses represent the normal capital expenditures of a law firm in operation.[11] The District Court found that such an organization was essential, stating:

> "In short, the Brooklyn office served as the home litigation office for the geographically scattered PMC members and brought a level of efficiency to the litigation that was not present before and that was badly needed." 611 F.Supp. at 1331.

The funds contributed by the members were maintained in separate PMC bank accounts and, in addition to paying office expenses, were used to pay deposition costs, expert witness fees, class action notice expenses, computer expenses and similar items, Dean Aff. at p. 8 (A 1285), and, it is noteworthy, not to pay expenses of individual PMC members. The costs were advanced for the capitalization of the joint venture and were not merely the aggregate costs of individual attorneys who were participating in the prosecution of the action.

The governing ethical rule does not prohibit the division of fees in this case.

Model Rule 1.5 provides in pertinent part:

> "(e) A division of fee between lawyers who are not in the same firm may be made only if:

---

11. Even some of the attorneys working on the class action could be deemed employees of the joint venture. *See, e.g.,* Report of Magistrate Scheindlin, which is an Appendix to Judge Weinstein's main opinion on attorneys fees, 611 F.Supp. 1347, 1363 (Alison Pettiette, Esq., assigned to the PMC by Petitioner John M. O'Quinn, was deemed in effect an associate of the "PMC").

> (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable."

The Official Comment to Rule 1.5 indicates that the rule contemplates the factual situation presented by this case:

> "A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. . . ."

In the class action context, the participation of the Court, as Judge Weinstein recognized, must substitute for that of the client, since as a practical matter the class is only informed of what the Court approves from material included in the notice of settlement. Judge Weinstein found that the requirements of the Model Rules were met. 611 F.Supp. at 1459. "First, each PMC member assumed joint responsibility for prosecution of the class action and that assumption of responsibility was approved by the Court on behalf of the class. . . . Second, the total fee allowed by the Court is reasonable by definition." 611 F.Supp. at 1459.

The Agreement would not have been prohibited under the old Code section. Under DR 2-107 (footnotes omitted):

"(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

In the ABA's final draft of DR 2-107(A), a footnote[12] to subsection (A)(3) referred to ABA Formal Opinion No. 204 (Nov. 24, 1940). Formal Opinion No. 204 prohibited fee-splitting "[w]here an attorney merely brings about the employment of another attorney but renders no service and assumes no responsibility in the matter." ABA, *Opinions on Professional Ethics* at p. 490 (1967). However, the division of *either* services *or* responsibility may be a basis for division of fees. Formal Opinion No. 204, *id.* at p. 491. Thus, Dean's complaint that one member of the PMC did not contribute as many hours[13] as he did is of no consequence since *all* members of the

12. The footnotes to the final draft were carried over into the Code as adopted in 1969 by the ABA House of Delegates to assist in synthesizing with the earlier Canons of Professional Ethics and Opinions of the ABA Committee on Professional Ethics. Courts have looked to the footnoted opinions in construing the Code. *See, e.g., Ruskay v. Jensen*, No. 71 Civ. 3169 (S.D. N.Y. Sept. 18, 1981) (available on LEXIS).

13. Petitioner Schwartz was awarded compensation by Judge Weinstein for over 400 hours, hardly a token effort.

PMC were charged by the District Court with responsibility for the class litigation and all shared that responsibility. Indeed the members other than Dean as a group contributed 70% of the time.

Moreover, the ABA Committee on Professional Ethics also stated in Formal Opinion No. 204 that "[m]easuring the relative division of service and responsibility between associate attorneys is *not* within the province of this ethics committee unless the resulting fee *to the client* is flagrantly excessive." *Id.* at pp. 490-91 (emphasis supplied). Neither the Code nor the Model Rules defines "responsibility", but Dean's reliance on ABA Informal Opinion No. 85-1514 (April 27, 1985) (Appellant's Brief at p. 26) is misplaced and his quotation is selective. That opinion states that "[t]he Committee is of the opinion that assumption of responsibility *does not require substantial services to be performed* by the lawyer since *assumption of responsibility is the alternative* to a division of fees in proportion to services performed." ABA Informal Opinion No. 85-1514 (April 27, 1985), *reprinted in* ABA/BNA Lawyer's Manual on Professional Conduct at pp. 801:373, 374.

Like the Court decisions cited above at pp. 15-16, the ABA Committees on Professional Ethics were *not* concerned with the relative allocation of fees among attorneys jointly responsible for a matter so long as the *total* fee to the client was reasonable. The reason, as Judge Richey stated in the *In Re Ampicillin Antitrust Litigation,* is that such allocation is best left to the attorneys themselves. *See also Ruskay v. Jensen,* No. 71 Civ. 3169 (S.D. N.Y. 1981) (available in LEXIS).

B. Establishment Of The Fee-Sharing Agreement Did Not Create Any Improper Conflict Of Interest Between The Lawyers And The Clients.

Dean asserts that the Agreement had to create an impermissible conflict of interest between the PMC and the class of Plaintiffs because it established in the PMC a financial interest which would militate against the ability of the attorneys to exercise their own independent professional judgment and cause a dilution of their loyalty to the class in violation of DR 5-103(A) of the now superceded ABA Code of Professional Responsibility.

The potential for conflict between attorneys and their clients always exists where litigation is prosecuted under an agreement where fees to be paid are contingent upon the success of the suit. Nonetheless, a contingent fee arrangement has long been authorized "because it may be the only means by which a layman can obtain the services of a lawyer of his choice." ABA Code of Professional Responsibility, EC 5-7, EC 2-20. The advancement of the costs of litigation were permitted under DR 5-103(B), with the caveat that the clients had to remain ultimately responsible for the disbursements. The advancement of costs is "often . . . the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim" ABA Code of Professional Responsibility, EC 2-20.

How else could major class actions proceed in the absence of contingent fees and advancement of costs? There will be very few representative Plaintiffs sufficiently wealthy and charity minded to advance the fees and expenses for the class as a whole.

It has long been obvious that, where an attorney has contributed substantial effort pursuant to a contingency fee agreement, there is a risk that the attorney might be guided in his negotiations on behalf of a client by his own self-interest in recovering a fee and that that self-interest might be adverse to the client's interest of obtaining the largest possible recovery. That risk is minimized in a federal class action since no settlement can be implemented in the absence of notice to the class with an opportunity to be heard, and an independent determination by a federal judge of the fairness and reasonableness of the settlement after such a hearing. *See* Fed. R. Civ. P. 23(e). Indeed, pursuant to Rule 23, Judge Weinstein considered the fairness and reasonableness of the settlement prior to the determination of fees and expenses to be awarded to counsel.

The Agreement did not conflict with old DR 5-103(A) since there was no acquisition of a proprietary interest in the cause of action. That is to say, the lawyers were entitled to no particular share of the settlement amount and were to be entitled only to that amount which the District Court would ultimately determine to be fair and reasonable. In terms of the relationship between the PMC and the class, all that has been done was for the PMC to agree that they would recover fees and disbursements only as awarded by the District Court from the successful prosecution of the litigation.

In addition, Rule 1.8(e) of the Model Rules has specifically eliminated the requirement in DR 5-103(B) that the clients retain responsibility for the reimbursement of disubrsements and now permits the reimbursement of disbursements to be contingent upon the outcome. Rule 1.8(e) provides as follows:

> "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

It should not be forgotten that the algebra of implementation of the Agreement could well have been very different had settlement not been reached prior to trial. Had the negotiations taken place months into the trial or with the jury out, the value of the time contributed by the members of the PMC likely would have grown much larger in relation to the risk capital. This is, of course, the routine situation in contingent fee litigation.

Dean does not suggest that the settlement was unfair or unreasonable and the mere fact that it occurred at the time that it did does not create the reality of any conflict of interest. Judge Gagliardi in *Ruskay,* Judge Luongo in *In Re Magic Marker Securities Litigation,* Judge Wright in *Valente,* Judge Brieant in *Del Noce* and Judge Richey in the *Ampicillin Antitrust Litigation,* see p. 16 above, all have approved the allocation among themselves by members of a committee of counsel of compensation for work, responsibility and risk. That is all that was done here. No part of the settlement was allocated to the attorneys other than amounts awarded by the Court under traditional notions of fairness and reasonableness.

Dean's complaint is nothing more than the "sour grapes" of a disgruntled contracting party, unhappy with the result of an agreement he negotiated in a risky venture, entered into freely, and from which he derived some but not all anticipated benefits. The amount awarded

Dean by the District Court, after adjustment pursuant to the Agreement, left him with an effective hourly rate of at least $86 after actual expenses. Had the District Court awarded the members of the PMC even a modest risk multiplier to time charges of 1.5, Dean's effective hourly rate would have increased to $196 and with a risk multiplier of 2.0, to $308.[14]

Surely Dean and all the other members of the PMC expected the District Court to award a risk multiplier were they to succeed in what was a most risky endeavor. Indeed, the District Court's extraordinary refusal to award any risk multiplier was cited as error on appeal, but the Court of Appeals denied such. Nonetheless, all members of the PMC, including Dean, understood that their Agreement would operate only if they were succesful and only with respect to fees finally awarded. Dissatisfaction with the award is no basis for avoidance of the Agreement. Given the finding of the District Court that the fee-sharing agreement did not affect the Plaintiff class in any way, there is no basis in law, equity or ethics to set it aside.

Professor Schuck, ante, in his definitive work on the Agent Orange Litigation, "Agent Orange on Trial" has correctly and pragmatically set forth the Fee Sharing

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14.

Hours Allowed	Fees Awarded	Fees Under Agmt.	Effective Hourly Rate
6,300.15	$1,424,284	$ 542,320	$ 86
1.5 risk multiplier	$2,136,426	$1,239,431	$196
2.0 risk multiplier	$2,848,567	$1,951,661	$308

A risk multiplier of 2.0 was approved in *Lindy II*. See 540 F.2d at 115-116.

Agreement in issue as the only practical means to prosecute such litigation and Dean's contentions as "more hypocritical than ethical, more delusive than just."

He candidly observed as material here:

> ". . . on December 13, 1984, the PMC executed an amended agreement, which was to be retroactive to October 1, 1983. The 'off-the-top' provision was retained—indeed, the amount that each financier might receive was increased to $750,000 (his $250,000 expenses contribution multiplied by three)—but this advantage was extended to the others (Dean, Schlegel and Musslewhite) albeit at a lower amount ($50,000 expenses each, multiplied by three). And instead of the percentage allocation specified for the remainder of the award, the new arrangement would divide the fees remaining after the off-the-top deductions according to the proportion that each lawyer's fee award bore to the total fee award.
>
> This last reason was obviated in May 1985 when Dean moved to invalidate the new agreement. Conceding that he had not signed it under duress or ignorance, he pointed out that under its terms he would receive $331,000 rather than the $1.34 million that the court had awarded him, a diminution of more than $1 million or 75 percent of his fee; Schlegel's reduction would be more than $530,000 and Musslewhite's more than $150,000. In contrast, Schwartz and O'Quinn would receive $475,000 and $426,000 more, respectively, than the Court had awarded them. Dean, the PMC's chief counsel, would receive an effective hourly rate of $55.62, while Schwartz, essentially a passive investor, would receive more than $1,700 per hour. This arrangement, Dean argued, constituted unethical fee splitting, disproportionate to the services performed and responsibility assumed, and champerty; it almost amounted to a usurious loan.

Dean's arguments have some force, yet the ethical strictures they embody seem curiously *anachronistic, quaint reminders of bygone attitudes* toward the social functions of adjudication. The legal system cannot have it both ways. If it desires the end, then it must desire (or at least accept) the *only practical means to that end.* If it wishes to encourage so-called public interest tort litigation on behalf of diffuse, poorly financed interests over extremely complex issues of scientific or technical *uncertainty,* then it must either transform the government into a tort litigator on behalf of these interests (a solution with enormous problems of its own), or it must countenance, indeed *welcome, private arrangements* for securing the resources necessary for effectively prosecuting such cases. The truth is that in the fall of 1983, if the Agent Orange litigation was to go forward, the resources of the financiers were desperately needed; it is no exaggeration to say that at that critical moment and thereafter, *they were needed far more than the chief trial counsel,* valuable as his services were. The otherwise grotesque inbalance revealed by Dean's comparisons reflected the relative value that their money and his services had for the survival of the case at that point, *a value Dean obviously appreciated when he signed the agreement.* Although the opportunism of investors is not a pretty or edifying sight, the prospect of meritorious cases failing for want of resources *is even less appealing.* Any set of principles that affirms the importance of litigating very costly cases while denying the means for doing so seems more *hypocritical* than ethical, more *delusive* than just.

On June 27, Weinstein rejected Dean's challenge to the agreement. After discussing the competing considerations, the judge chose to address the ethical problems case by case rather than announce any general rule. In this case, he observed, any conflict of interest and incentives to settle prematurely were

> purely *hypothetical,* for he had found the settlement to be fair and in the best interest of the class. In the future, however, lawyers would be required to disclose to the court the existence and terms of such a fee-sharing arrangement, so that the court could protect the class—perhaps by requiring modifications, reconsidering class certification, or notifying the class—and the lawyers could proceed accordingly.[15]

Of course, as to this latter caveat, Petitioners complied with it by their disclosures to Special Master Schreiber (Appendix Exhibit C, ante and infra).

This Court has long recognized the application in equitable proceedings such as this (*i.e.,* the equitable fund doctrine under its *Trustees v. Greenough,* ante 105 U.S. 527, 26 L.Ed. 1157 (1882)). *See e.g. International News Service v. Associated Press,* 248 U.S. 215, 39 S. Ct. 68 (1918) (held inapplicable there, although recognized in principal).

CONCLUSION

For the foregoing valid and compelling reasons, this Honorable Court should issue its Writ of Certiorari and grant this Petition. To do otherwise will be to pronounce the death knell on the next vital public policy litigation which poses serious legal obstacles and requires extensive effort and resources to combat adversaries with unlimited resources.[16]

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15. "Agent Orange On Trial", Belknap Press of Harvard University, 1986 at p. 120, fn. 23.

16. It was estimated that as of the May 7, 1984 date of trial, the seven chemical companies had expended some $74 million in fees and costs. Firemans Funds, insurer for Dow Chemical, in addition to counsel, employed up to ninety paralegals at the height of the litigation and had an annual budget exceeding $5 million, more than the entire total award to the "PMC".

Dated September 1, 1987

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing was served by U.S. Mail, first class, postage prepaid, on this ~~5th~~ 1st day of August, September 1987 as per the service list attached.

_____

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APPENDIX

EXHIBIT A

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

(Appeal of David DEAN).

No. 1118, Docket 85-6365.

United States Court of Appeals,
Second Circuit.

Argued April 10, 1986.

Decided April 21, 1987.

One member of plaintiff's management committee in Agent Orange class action appealed from order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, 611 F.Supp. 1452, which upheld fee sharing agreement between lead counsel. The Court of Appeals, Miner, Circuit Judge, held that agreement under which certain members of management committee would advance funds for litigation expenses and receive threefold return on that investment out of the fee settlement was invalid and would not be enforced in view of its potential for creating conflict between counsel and the class.

Reversed.

Leon Friedman, Hempstead, N.Y., for appellant Dean.

Elihu Inselbuch (Gilbert, Segall and Young, New York City, Richard B. Schaeffer, New York City, of counsel) for appellee Agent Orange Plaintiffs' Management Committee.

Before VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

MINER, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, 818 F.2d 145. This portion of the *Agent Orange* appeal concerns the district court's approval of a fee sharing agreement entered into by the nine-member Plaintiffs' Management Committee ("PMC") in December of 1983. Under the agreement, each PMC member who had advanced funds to the class for general litigation expenses was to receive a threefold return on his investment prior to the distribution of other fees awarded to individual PMC members by the district court. In result, the agreement dramatically increased the fees awarded to those PMC members who had advanced funds to the class for expenses, and concurrently decreased the fees awarded to non-investing PMC members, who only performed legal services for the class.

David Dean, lead trial counsel for the plaintiff class and a non-investing member of the PMC, challenges the validity of the agreement, to which he was a signatory, contending that it violates DR 5-103 and DR 2-107(A) of the ABA Code of Professional Responsibility ("ABA Code"). The ABA Code provisions prohibit an attorney from acquiring a proprietary interest in an action in which he is involved and from dividing a fee with an attorney who is not a

member of his firm, unless such division is made pursuant to client consent and is based upon services performed and responsibility assumed. In addition, Dean asserts that such an agreement, which premises the size of a fee on the amount advanced for expenses rather than on services rendered, violates the standards and principles developed in this circuit for the award of attorneys' fees in equitable fund class actions and inevitably places class counsel in a position at odds with the interests of the class itself.

Although not informed of the existence of the fee sharing agreement until September of 1984, four months after the parties reached a settlement, the district court approved the agreement, holding that "there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle." *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1452, 1461 (E.D.N.Y. 1985) (*"Agent Orange I"*). In essence, the court determined that the substantial financial demands placed upon counsel in complex multiparty litigation require flexibility in reviewing internal fee sharing agreements so as not to discourage future representation of large plaintiff classes. At the same time, however, the district judge ruled that, in all future cases, counsel must notify the court of any fee sharing agreement *at the time of its inception.* In this way, according to the district judge, "the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds." *Id.* at 1463.

Because we find that the agreement before us violates established principles governing awards of attorneys' fees in equitable fund class actions and creates a strong

possibility of a conflict of interest between class counsel and those they were charged to represent, we reverse the district court's approval of the agreement. Accordingly, the fees originally allocated by the district court, based on the reasonable value of service actually rendered, will be distributed to the members of the PMC.

I. BACKGROUND

In September of 1983 Yannacone and Associates withdrew as attorneys for the class, claiming financial and management hardships. The district court then approved appointment of the PMC as new class counsel. The PMC was comprised of three members—attorneys Stephen Schlegel, Benton Musslewhite and Thomas Henderson. *In re "Agent Orange" Product Liability Litigation,* 571 F.Supp. 481 (E.D.N.Y. 1983). In later months the district court approved the expansion of the PMC to encompass six additional members, including appellant David Dean. Dean, a member of the original panel of class counsel had been closely involved with the Agent Orange litigation since its inception in 1979. In October of 1983 the district court appointed him to be the attorney responsible for leading the preparation and potential trial of plaintiffs' case.

In December of 1983, as a means of raising the capital necessary for the maintenance and continuation of the lawsuit, the nine PMC members entered into a written fee sharing agreement whereby six of the members each promised to advance the class $200,000 for general litigation expenses. The agreement provided that the investing members would be reimbursed threefold from the pool of attorneys' fees awarded to PMC members upon successful completion of the action. The fees remaining

in the pool after the investment payouts would be distributed pursuant to a fifty-thirty-twenty percent formula: fifty percent of the remainder would be distributed equally among the nine PMC members, thirty percent would be distributed according to the number of hours each member expended in the case, and twenty percent would be distributed in accordance with certain quality and risk factors relating to each PMC member's work in the action, as determined by a majority vote of the PMC. All PMC members, including Dean, signed the agreement. The district court, however, was not notified of its existence.

The action was settled in May of 1984 and the district court, by order dated June 11, 1984, notified counsel that petitions for attorneys' fees were to be submitted to the court no later than August 31, 1984. A hearing on the issue of fees was scheduled for late September. In ordering the hearing, the district court waived application of Rule 5 of the Local Rules of the Eastern District of New York requiring notice to the class of all fee applications *and fee sharing agreements* prior to the hearing on such fee petitions. The court gave as its reasons "the need for continued intensive work by the attorneys until the close of the fairness hearings and . . . the complexity of the fee applications." Notice of Proposed Settlement of Class Action, *reprinted in In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 867 (E.D. N.Y. 1984). When the court waived application of the local rule, it was unaware of the PMC fee sharing agreement.

It was not until the PMC submitted its joint fee petition that the court finally learned of the agreement. At the September hearing on the fee petitions, the district

judge expressed doubts as to the agreement's propriety and requested further briefing on the issue. Faced with the reservations expressed by the district judge, the PMC members modified their agreement in December of 1984. The revised agreement, and the one now before us, provided that five of the six investing members of the PMC each would advance an additional $50,000 for general litigation expenses, bringing their total investments to $250,000 each. In return for these advances, as well as for the $200,000 advanced by the sixth investing member, the new agreement provided for the same threefold return as did the original agreement. The fifty-thirty-twenty percent formula for the distribution of the remaining portion of the fees, however, was eliminated. In its place, the revised agreement called for the remainder to be distributed *pro rata* to each PMC member "in the proportion the individual's and/or firm's fee award bears to the total fees awarded."[1] *Agent Orange I,* 611 F.Supp. at 1454.

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1. The agreement, in pertinent part, provided as follows:
When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O'Quinn and Schwartz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to $250,000.00 with a multiplier of three (i.e., none of these six individuals will receive more than $750,000.00 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of litigation up to $50,000.00 with a multiplier of three (i.e., none of these three signatories will receive more than $150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court. All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed pro rata to each signatory in the proportion

On January 7, 1985, the district court issued a Memorandum and Order awarding over $10 million in fees and expenses to the various counsel whose work had benefitted the class, applying the principles of fee distribution in equitable fund actions set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell I*") and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) ("*Grinnell II*"). *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. 1985) ("*Agent Orange II*"). As later amended and supplemented, the district court's decision awarded over $4.7 million in fees to the nine members of the PMC on an individually apportioned basis. David Dean, due to his lengthy involvement in the class action and the exceptional quality of his work, was awarded $1,424,283.75, or over thirty percent of all fees awarded to the PMC. Each of the six investing members of the PMC was awarded a much lower percentage of the entire PMC fee award, with one investor being awarded only $41,886. The highest award to an investor was $515,163.

Once the fee sharing agreement was applied to these awards, however, the amount of fees each PMC member was to receive changed dramatically. In Dean's case, application of the agreement reduced his award to $542,310, a reduction of $881,973. In contrast, Newton Schwartz, an investing member of the PMC to whom the district court awarded $41,886, was now to receive $513,026, equivalent to an hourly rate of $1,224.81. The awards to all other investing members were similarly enhanced

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the individual's and/or firm's fee award bears to the total fees awarded.

In re Agent Orange Product Liability Litigation, 611 F.Supp. 1452, 1454 (E.D.N.Y. 1985) (quoting Revised Fee-Sharing Agreement, Dec. 13, 1984).

and, in turn, the awards to the two other non-investing members were diminished, resulting in a distortion of the district court's individual PMC member fee awards. The total of all fees awarded by the court to the members of the PMC, of course, remained unchanged.[2]

In May of 1985, Dean moved in the district court to overturn the fee sharing agreement, claiming that it violated professional ethics and did not protect the rights of the class. In a Memorandum and Order issued June 27, 1985, the court denied Dean's motion and upheld the agreement, albeit with some reluctance. The court found, as a factual matter, that no conflict of interest had arisen in the litigation from the fee sharing agreement and, consequently, that the interests of the class in obtaining a fair and reasonable settlement had not been impinged. *Agent Orange I,* 611 F.Supp. at 1461. Initially, the court recognized its obligation to review the agreement in its capacity as protector of the rights of the plaintiff class. It then went on to examine the propriety of the agreement

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2. The effect of the fee sharing agreement on the district court's fee awards to the individual PMC members is shown by the following chart.

	Amount of Fees Awarded by District Court	*Amount of Fees Awarded Under the Agreement*	*Net Effect of the Agreement*
Dean (noninvestor)	$1,424,283	$542,310	- $881,973
Schlegel (noninvestor)	944,448	393,312	- 549,136
Musslewhite (noninvestor)	344,657	206,991	- 137,666
Schwartz (investor)	41,886	513,026	+ 471,140
O'Quinn (investor)	132,576	541,128	+ 408,552
Brown (investor)	348,331	608,162	+ 259,831
Locks (investor)	487,208	651,339	+ 164,171
Chesley (investor)	475,080	647,534	+ 172,456
Henderson (investor)	515,163	659,975	+ 144,812

Brief for Appellant at 8.

under DR 2-107(A) and DR 5-103 of the ABA Code and the practical effect of the agreement on the PMC's representation of the class.

As to DR 2-107(A), which prohibits an attorney from splitting his fee with another attorney not of the same firm unless he has the consent of his client and the "division is made in proportion to the service performed and responsibility assumed by each," the court determined that the PMC should be viewed as an *ad hoc* law firm "formed for the purpose of prosecuting the Agent Orange multidistrict litigation," *Agent Orange I,* 611 F.Supp. at 1458. The court reasoned that the business realities of the litigation required the PMC to be able to perform those functions ordinarily performed by actual law firms, such as splitting fees among its members. The district court also noted that the Model Rules of Professional Conduct ("Model Rules") adopted by the ABA in 1983, although not adopted in New York, reflect "an increased recognition" of these business realities by permitting fee sharing agreements based upon services rendered *or* upon written acceptance of joint responsibility by the attorneys if the client is advised of the participation and does not object and the total fee is reasonable. Model Rule 1.5(e). Recognizing the practical problem of client consent in class actions, however, the district court concluded that its duty to protect the rights of the class ordinarily could not be performed unless the attorneys involved notified the court of the existence of such an agreement "as soon as possible," *Agent Orange I,* 611 F.Supp. at 1459.

As to DR 5-103, which prohibits an attorney from acquiring a proprietary interest in an action in which he is involved, the court found that the investing members

acquired no independent interest in the action because the financial return from any initial advance for expenses was to be paid from the fees otherwise awarded to the PMC members, and thus would not affect the class fund. While the court did recognize that a conflict of interest could arise from such an agreement, it cautioned that complex class actions require a more sophisticated analysis of ethical codes than ordinary two-party cases in order not to "unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class." *Id.* at 1460. Accordingly, the district court held that a case-by-case analysis of such fee sharing agreements to identify potential conflicts of interest should be adopted.

The court conceded that an agreement of the sort before it conceivably could create an interest on the part of the investors to settle early, regardless of the benefit to, or interest of, the class. This is because an attorney whose fee is based upon the amount of funds advanced for expenses in an action will receive the same fees "whether the case is settled today or five years from now." *Id.* The court reasoned, however, that any possible interest to settle early would have been offset by the theoretical incentive to extend such litigation created by the lodestar formula and concluded that, as a factual matter, no conflict had arisen here.

The court then set forth five additional, though non-dispositive, reasons for approving the agreement. First, the returns on the investments did not affect the class fund, since they were paid from the fee awards of PMC members. Second, the court recognized that the "business" of law will at times require creative, yet ethical, methods

for economical and efficient operation. Third, without the funds advanced by the PMC members, it was possible that the litigation would have collapsed and neither the attorneys nor the class would receive any payments. Fourth, the court noted that the PMC members could have earned substantial returns, though not quite threefold, on these same funds if they had undertaken more traditional investments. Fifth, if the PMC members had received the amount of fees requested in their joint petition, nearly thirty million dollars, the extent of the distortion of the fees by the investment agreement would have been insubstantial.

In sum, the district court determined that the practical needs of this form of litigation required an inventive method of fund raising in order to guarantee effective representation of class rights. At the same time, however, it labeled as "troubling" the PMC's failure to inform the court of the existence of the agreement until months after a settlement had been reached. *Id.* at 1462. In light of class counsel's fiduciary obligations to the class and the court's role as guardian of class rights in relation to settlement review, the district court found that both the class and the court had a right to be notified of the existence of such an agreement. To this end, the court proclaimed that in all future cases, class counsel would be obligated to make the existence of a fee sharing agreement known to the court at the time of its formation.

II. DISCUSSION

Dean's appeal presents an issue of first impression: whether an undisclosed, consensual fee sharing agreement, which adjusts the distribution of court awarded fees in amounts which represent a multiple of the sums advanced

by attorneys to a class for litigation expenses, satisfies the principles governing fee awards and is consistent with the interests of the class.

[1, 2] At the outset, we note that the fees in this case were awarded pursuant to the equitable fund doctrine, first set forth in *Trustees v. Greenough,* 105 U.S. (15 Otto) 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 5 S. Ct. 387, 28 L.Ed. 915 (1885). The underlying rationale for the doctrine is the belief that an attorney who creates a fund for the benefit of a class should receive reasonable compensation from the fund for his efforts. *Central Railroad,* 113 U.S. at 125. Because the calculation of fees necessarily will affect the funds available to the class, this circuit has adopted a lodestar formula for fee computation. *Grinnell II,* 560 F.2d at 1099; *Grinnell I,* 495 F.2d at 471. The lodestar seeks to protect the interests of the class by tying fees to the "actual effort made by the attorney to benefit the class." *Grinnell II,* 560 F.2d at 1099. Accordingly, fees are calculated by taking the number of hours reasonably billed and multiplying that figure by an hourly rate "normally charged for similar work by attorneys of like skill in the area." *Id.* at 1098. Once calculated, the court may, in its discretion, increase or decrease this figure by examining such factors as the quality of counsel's work, the risk of the litigation and the complexity of the issues. *Id.* Discretion to adjust the lodestar figure upward because of superior quality, however, is limited to exceptional situations and must be supported by "specific evidence" and "detailed findings" by the district court. *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air,* ___ U.S. ___, 106 S. Ct. 3088, 3098, 92 L.Ed.2d 439

(1986). Adherence to these principles is essential not only to avoid awarding windfall fees to counsel, but also to "avoid every appearance of having done so," *Grinnell I*, 495 F.2d at 469.

[3, 4] Of equal importance to our analysis is Fed. R. Civ. P. 23(e), which requires court approval of any settlement of a class action suit and squarely places the court in the role of protector of the rights of the class when such a settlement is reached and attorneys' fees are awarded. *Grinnell II*, 560 F.2d at 1099. In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel. *Agent Orange I*, 611 F. Supp. at 1456. In addition, where only retrospective review of counsel's conduct is available, courts should not be limited to an examination of the actual effects of such conduct on the litigation, but rather as the ABA Code and *Grinnell I* imply, the appearance and potential effect of the conduct should be reviewed as well. *See Grinnell I*, 495 F.2d at 469; ABA Code of Professional Responsibility Canon 9 (1975).

[5] The ultimate inquiry, therefore, in examining fee agreements and setting fee awards under the equitable fund doctrine and Fed. R. Civ. P. 23(e), is the effect an agreement could have on the rights of a class. Because we find that the agreement here conflicts substantially with the principles of reasonable compensation in common fund actions set forth in *Grinnell I* and *Grinnell II*, and that it places class counsel in a potentially conflicting position in relation to the interests of the class, we reverse.

Initially, it is beyond doubt that the agreement, by tying the fee to be received by individual PMC members

to the amounts each advanced for expenses, completely distorted the lodestar approach to fee awards. In setting fees here, the district judge meticulously examined counsel's fee petitions in accordance with the *Grinnell* decisions and arrived at individual awards for each PMC member based upon the services that each had provided for the class. By providing for threefold returns of advanced expenses, however, the agreement vitiated these principles. The distortion was so substantial as to increase the fees awarded to one investor by over twelve times that which the district judge had determined to be just and reasonable, and, in a second case, to decrease the otherwise just and reasonable compensation of a non-investor by nearly two-thirds.

There is authority for a court under certain circumstances, to award a lump sum fee to class counsel in an equitable fund action under the lodestar approach and then to permit counsel to divide this lodestar-based fee among themselves under the terms of a private fee sharing agreement. *E.g., Ruskay v. Jensen,* No. 71-3169, slip op. at 10-13 (S.D.N.Y. Sept. 18, 1981); *In re Magic Marker Securities Litigation,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,116, at 96,195 (E.D. Pa. Sept. 16, 1979); *Valente v. Pepsico, Inc.,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,921, at 95,863 (D. Del. June 4, 1979), *appeal dismissed,* 614 F.2d 772 (3d Cir. 1980); *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 395, 400 (D.D.C. 1978); *Del Noce v. Delyar Corp.,* 457 F.Supp. 1051, 1055 (S.D.N.Y. 1978). We reject this authority, however, to the extent it allows counsel to divide the award among themselves in *any* manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role

as protector of class interests under Fed. R. Civ. P. 23(e) and its role of assuring reasonableness in the awarding of fees in equitable fund cases. *See Kamens v. Horizon Corp.*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,007, at 91,218 & n. 4 (S.D.N.Y. May 26, 1981); *Steiner v. BOC Financial Corp.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,656, at 98,490 (S.D. N.Y. Oct. 10, 1980); *cf. Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) ("if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims"), *cert. denied*, 466 U.S. 944, 104 S. Ct. 1929, 80 L.Ed.2d 474 (1984). In addition, this approach overlooks the class attorneys' "duty . . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach." *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980).

A careful examination of those decisions permitting internal fee sharing agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of those cases the courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. *E.g., Ruskay*, slip op. at 14 n. 4 ("Since the court has satisfied itself that the proposed distribution will not result in compensation beyond services performed, it declines to overrule the agreement."); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. at 400 ("Since the fee application purports to be based upon the rates and time spent by the several attorneys, it is presumed that these factors also weigh heavily in this internal agreement.").

[6] Accordingly, while the practice of allowing class counsel to distribute a general fee award in an equitable fund case among themselves pursuant to a fee sharing agreement is unexceptional, we find that any such agreement must comport essentially with those principles of fee distribution set forth in *Grinnell I* and *Grinnell II*. This does not mean that a fee sharing agreement must replicate the individual awards made to PMC members under the district court's lodestar analysis. Even after the court makes the allocation, the attorneys may be in a better position to judge the relative input of their brethren and the value of their services to the class. *See In re Ampicillin Antitrust Litigation*, 81 F.R.D. at 400. Nor does this mean that class counsel need follow, line by line, the lodestar formula in arriving at an agreement as to fee distribution. Obviously, the needs of large class litigation may at times require class counsel, in assessing the relative value of an individual attorney's contribution, to turn to factors more subjective than a mere hourly fee analysis. It does mean that the distribution of fees must bear some relationship to the services rendered.

In our view, fees that include a return on investment present the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent. "[W]henever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur." *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978). The concern is not necessarily in isolating instances of major abuse, but rather is "for

those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 266 (Oct. 8, 1985). Such conflicts are not only difficult to discern from the terms of a particular settlement, but "even the parties may not be aware that [they exist] at the time of their [settlement] discussions," *id.* This risk is magnified in the class action context, where full disclosure and consent are many times difficult and frequently impractical to obtain. *In re Mid-Atlantic Toyota Antitrust Litigation,* 93 F.R.D. 485, 490-91 (D. Md. 1982); *Gould v. Lumonics Research Ltd.,* 495 F.Supp. 294, 297 n. 6 (N.D. Ill. 1980).

[7] The district court recognized that the agreement provided an incentive for the PMC to accept an early settlement offer not in the best interests of the class, because "[a]n attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now." *Agent Orange I,* 611 F.Supp. at 1460. Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. Unlike the district court, however, we conclude that the risk of such an adverse effect on the settlement process provides adequate grounds for invalidating the agreement as being inconsistent with the interests of the class. The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks asso-

ciated with continuing the litigation. The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement.

[8] The district court's factual finding, that the adequacy of the settlement demonstrated that the agreement had no effect on the PMC's conduct, is not dispositive. The district court's retrospective appraisal of the adequacy of the settlement cannot be the standard for review. The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed. Review based on a fairness of settlement test would not ensure the protection of the class against potential conflicts of interest, and, more important, would simply reward counsel for failing to inform the court of the existence of such an agreement until after a settlement.

We also reject the district court's finding that its authority to approve settlement offers under Fed. R. Civ. P. 23(e) acts to limit the threat to the class from a potential conflict of interest. At this late stage of the litigation, both class counsel and defendants seek approval of the settlement. The court's attention properly is directed toward the overall reasonableness of the offer, and not necessarily to whether class counsel have placed themselves in a potentially conflicting position with the class. It would be difficult indeed for a court at this stage to hold that, regardless of the terms of the settlement, class counsel had not fulfilled its obligation to the class. Given this focus and other administrative concerns that may come to bear, we find the approval authority, in this con-

text, to be insufficient to assure that the ongoing interests of the class are protected. *See Alleghany Corp. v. Kirby,* 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (at this stage of litigation, "[a]ll the dynamics conduce to judicial approval of such settlements"), *cert. dismissed,* 384 U.S. 28, 86 S. Ct. 1250, 16 L.Ed.2d 335 (1966); *In re Mid-Atlantic Toyota Antitrust Litigation,* 93 F.R.D. at 491 (court authority to review settlement offers not adequate to safeguard against dangers of conflict of interest); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor In Shareholder Litigation,* 48 Law & Contemp. Probs. 5, 26-27 (Summer 1985) (judicial review not a significant barrier to collusive settlements).

Equally unpersuasive is the district court's determination that the potential incentive to settle early is offset by an incentive, fostered by the lodestar formula, to prolong the litigation. While a number of commentators have asserted that use of the lodestar formula encourages counsel to prolong litigation for the purpose of billing more hours, *e.g.,* Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limit of Proportional Discipline,* 47 Law & Contemp. Probs. 293, 302 (Winter 1984), the formula's effect in this regard is far from clear, *See* Coffee, *supra,* at 34-35 ("the claim that the lodestar formula results in excessive fees is nonetheless a red herring"); Mowrey, *Attorneys Fees In Securities Class Action and Derivative Suits,* 3 J.Corp.Law. 267, 343-48 (1978) (attorneys' fees awards by district courts have not risen since adoption of lodestar analysis); *see also* 7B C. Wright, A. Miller & M. Kane, *Federal Pratice and Procedure* § 1803, at 508 (1986) (no empirical data show any incidence of district courts awarding excessive fees). Moreover, the court's authority in reviewing fee

petitions and approving or disapproving hours billed in an equitable fund action works as a substantial and direct check on counsel's alleged incentive to procrastinate. *In re Equity Funding Corporation of America Securities Litigation,* 438 F.Supp. 1303, 1328 (C.D. Cal. 1977); 7B C. Wright, A. Miller & M. Kane, *supra,* § 1803, at 511. Consequently, we do not view the lodestar system as countervailing the clear interest in early settlement created by the private agreement.

[9] Additionally, potential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to tthe interests of class counsel. *Susman v. Lincoln American Corp.,* 561 F.2d 86, 95 (7th Cir. 1977); *Prandini v. National Tea Co.,* 557 F.2d 1015, 1017 (3d Cir. 1977). While today we hold that the settlement reached here falls within that range of reasonableness permissible under Fed. R. Civ. P. 23(e), we are not insensitive to the perception of many class members and the public in general that it does not adequately compensate the individual veterans and their families for whatever harm Agent Orange may have caused. To be sure, the settlement does not provide the individual veteran or his family substantial compensation. Given the facts of this settlement, the potentially negative public perception of an agreement that awards an investing PMC member over twelve times the amount the district court has determined to be the value of his services to the class provides additional justification for invalidating the agreement and applying the lodestar formula.

[10, 11] We find the various additional rationales for approving the fee sharing agreement set out in the district

court's decision equally unpersuasive. First, the fact that the returns on the advanced expenses did not directly affect the class fund is of little consequence, since we have already determined that the district court's responsibility under *Grinnell I* and *Grinnell II*, as well as under Fed. R. Civ. P. 23(e), goes beyond concern for only the overall amount of fees awarded and requires attention to the fees allocated to individual class counsel. Second, while we sympathize with counsel regarding the business decisions they must make in operating an efficient and manageable practice and agree that a certain flexibility on the court's part is essential, we are not inclined to extend this flexibility to encompass situations in which the bases for awarding fees in an equitable fund action are so clearly distorted. Third, whether this class action would have collapsed without an agreement calling for a threefold return is a matter of speculation. Any such collapse, however, would have been due to the pervasive weaknesses in the plaintiffs' case. Fourth, we find wholly unconvincing the district court's suggestion that the investors could have made a sizeable return on their funds if they had invested them in other ventures. We take notice of the fact that a threefold return on one's money is a rather generous return in any market over a short period of time. Fifth, while the effect of this fee sharing agreement might have been dwarfed to the point of insignificance if the fees awarded to counsel had been much greater, this simply is too speculative to defend the agreement as not affecting the interests of the class. Finally, we do not find class counsel to have formed an *ad hoc* partnership. They merely are a group of individual lawyers and law firms associated in the prosecution of a single lawsuit, and they lack the ongoing relationship that is the essential element of attorneys practicing as partners.

[12] We do not agree with the district court's ruling that in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel to conform more closely with the principles of *Grinnell I* and *Grinnell II*. In the present case, however, where the district court was not made aware of the agreement, and the potential for a conflict of interest arising was substantial, the adoption of a rule for future cases in no way alleviates the fatal flaws of this agreement and does not offset the need for its invalidation.

Although appellant Dean is successful on this appeal, his conduct has been far from praiseworthy. He freely consented to the formation of the agreement in December of 1983 and later to its revision in 1984. He did not even inform the district court of the existence of the agreement or of his objections to it until long after the settlement was reached. If he had called the agreement into question immediately, a great deal of time and expense could have been saved.

III. CONCLUSION

Having determined that the fee sharing agreement violates the principles for awarding fees in an equitable fund action and places class counsel in a position potentially in conflict with the interests of the class which they represent, we reverse. We award all the PMC members the fees to which the district court determined they were entitled.

EXHIBIT B

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

(Appeal of ATTORNEYS' FEE AWARDS).

No. 1097, Dockets 85-6305, 85-6325, 85-6343, 85-6345, 85-6347, 85-6351, 85-6353, 85-6355, 85-6357, 85-6359, 85-6361, 85-6363, 85-6383, 85-6389 and 85-6397.

United States Court of Appeals, Second Circuit.

Argued April 10, 1986.

Decided April 21, 1987.

Appeal was taken from order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, 611 F.Supp. 1296, which awarded attorney fees from fund resulting from settlement of Agent Orange class action against manufacturers. The Court of Appeals, Miner, Circuit Judge, held that: (1) Court's across-the-board reduction in certain expenses and billable hours was proper; (2) use of national hourly rates was proper; (3) awards based on $150 per hour for partners, $100 per hour for associates, and $125 per hour for law professors were adequate; (4) Court did not abuse its discretion in awarding multipliers for quality to six members of plaintiffs' management committee; (5) Court properly declined to award risk multiplier; but (6) Court should not have abrogated award to one

firm because of that firm's use of discovery materials obtained in class litigation to represent clients who had opted out of the class.

Affirmed in part and reversed in part.

Paul M. Bernstein, New York City (Bernstein Litowitz Berger & Grossmann, New York City, Edward A. Grossmann and Penny P. Domow, New York City, of counsel), for appellant Agent Orange Plaintiffs' Management Committee.

Edward F. Hayes, III, Huntington, N.Y. for appellants McMillan, Bigg, Lonnie, Davison and MacLaren.

Benton Musslewhite, Houston, Tex., pro se.

Robert A. Taylor, Jr., Washington, D.C. (Ashcraft & Gerel, Wayne M. Mansulla, Washington, D.C., of counsel) for appellant Ashcraft & Gerel.

Leon Friedman, Hempstead, N.Y., for appellants Dean, Falanga & Rose.

Henderson & Goldberg, Pittsburgh, Pa., Thomas W. Henderson and Antonio D. Pyle, Pittsburgh, Pa., of counsel, for appellant Henderson & Goldberg, P.C.

Greitzer and Locks, Philadelphia, Pa., Neil R. Peterson, Philadelphia, Pa., of counsel, for appellants Greitzer and Locks, Schlegel & Trafelet, Henderson & Goldberg, O'Quinn, Hagan & Whitman, Newton B. Schwartz, P.C., Waite, Schneider, Bayless & Chesley and Hoberg, Finger, Brown, Cox & Milligan.

Edward J. Nowakoski, West Caldwell, N.J., of counsel, for appellant Kraft & Hughes.

Sullivan & Associates, Daniel C. Sullivan and Gregory A. Stayart, Chicago, Ill., of counsel, for appellant Sullivan & Associates, Ltd.

Stephen J. Schlegel, Chicago, Ill., pro se.

Richard D. Heideman, A. Thomas Johnson, Heideman Law Offices, Louisville, Ky., of counsel, for appellant Estate of Lowell M. Coffey.

Townley & Updike, New York City, Richard J. Barnes and John E. Sabetta, New York City, of counsel, for appellee Monsanto Co.

Kelley Drye & Warren, New York City, William M. Crowley and Patricia C. Tui, New York City, of counsel, for appellee Hercules Inc.

Before VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

MINER, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, 818 F.2d 145. The nine members of the Plaintiffs' Management Committee ("PMC") and various outside counsel appeal, on a number of grounds, the district court's decision setting attorneys' fees. On June 18, 1985, the district court issued an amended order, awarding over seven million dollars in fees and three million dollars in expenses to eighty-eight attorneys and law firms involved in the action. *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296 (E.D.N.Y. 1985) (*"Agent Orange"*). The nine members of the PMC, individually and as a group, challenge the district court's use of a national hourly rate in calculating the fee awards under

the lodestar formula set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*"Grinnell I"*), and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) (*"Grinnell II"*), the level of the quality multipliers it set, and its failure to apply a risk multiplier to the fee awards and to credit certain hours and expenses. Four outside counsel challenge the district court's findings as to the value of their work to the class and the decision to abrogate various contingency fee arrangements between counsel and certain class members. For the reasons set forth below, we affirm in part and reverse in part.

I. BACKGROUND

In May of 1984, on the eve of trial, a settlement was reached with the chemical company defendants, calling for the establishment of a $180 million dollar fund for the benefit of the class. By order dated June 11, 1984, the district court required fee petitions to be filed no later than August 31, 1984, and scheduled hearings on the petitions for the early fall. Notice of Proposed Settlement of Class Action, *reprinted in In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 867 (E.D. N.Y. 1984). Pursuant to this procedure, well over 100 attorneys and law firms filed petitions, claiming tens of thousands of hours of work performed for the benefit of the class. The fee petitions fell into three categories: those filed by the nine members of the PMC; those filed by members of Yannacone and Associates, the original consortium of attorneys in charge of the action; and those filed by attorneys not connected with any court-appointed entity representing the class.

In reviewing fee petitions, the district court developed guidelines falling into two categories—one covering the

hours to be credited for work performed and the other covering the expenses to be reimbursed. The hourly guidelines were as follows:

1. *Court Time:* One half of the time requested for review of court orders was permitted on the ground that the majority of court orders were made in open court or after extensive briefing. Telephone conference time with court personnel was awarded in full, except that no time was awarded for conferences relating to internal management difficulties of the PMC. Attendance at, and preparation for, court hearings was awarded in full. Review of hearing transcripts was awarded in full for those attorneys attending the hearing. Nonattending attorneys were awarded for only half such time. Travel to and from hearings and court appearances also was awarded on a fifty percent basis.

2. *Management Committee Meetings:* All time for PMC meetings on substantive issues was permitted. Travel to and from such meetings was awarded on a fifty percent basis. No time was awarded for meetings on nonsubstantive topics. The same division was made for telephone conferences among PMC members.

3. *Educational Reading:* Time for review of scientific materials relating to the causation issue and other issues in the case was awarded on a fifty percent basis on the ground that such knowledge could be used by counsel in future cases.

4. *Depositions:* Half of the time was awarded for travel to and from depositions, for attendance by nonparticipating attorneys, and for review and reading. All time for preparing and summarizing depositions was granted. No limit on the length of depositions was enforced.

5. *Document Preparation:* All time for review and preparation of legal documents was awarded, except that those hours used to prepare documents concerning internal PMC organizational issues were not credited.

6. *Mail:* If a short period of time for review of a substantial amount of mail was requested, no time was awarded under the assumption that counsel simply was opening the mail. If a lengthy period of time was claimed for review of only a few letters, all time was credited under the assumption that counsel was reviewing a letter brief.

7. *Intra-Firm Conferences:* This time was credited on a fifty percent basis when related to substantive issues.

Agent Orange, 611 F.Supp. at 1320-21, 1350-51. The expense guidelines were as follows:

1. *Travel:* Documented expenses for hotels were reimbursed at ninety dollars per day. Meals were reimbursed at fifty dollars per day and twenty dollars per day if the attorney was in his home city.

2. *Paralegal Time:* Paralegals were treated as an expense and reimbursed at a rate of twenty dollars per hour.

3. *Out-of-Pocket Expenses:* Telephone, mailing, duplication and similar expenses were reimbursed in full if adequately documented.

4. *Percentage Approval:* When counsel submitted adequate documentation to prove expenses but were unable to establish that those expenses were all related to compensable activity, expenses were reimbursed on a percentage basis.

5. *Fees for Non-Causation Experts:* A cap of $5,000 per expert was set on the ground that their

> input was not substantial and not reasonably related to class interests.

Id. at 1321-22, 1351.

Following these guidelines and applying the lodestar formula for calculating attorneys' fees in an equitable fund action, *see Grinnell I,* 495 F.2d at 471, the district court awarded $10,767,443.63 in individual fees and expenses to various counsel who, in the court's view had performed work beneficial to the class. In arriving at the lodestar figure, the court employed national hourly rates of $150 for the work of a partner, $100 for the work of an associate, and $125 for the work of a law professor. *Agent Orange,* 611 F.Supp. at 1326. The court, in its discretion, further applied quality multipliers, ranging from 1.50 to 1.75, to the fees allowed various members of the PMC and other counsel who had exhibited exceptional skill in the litigation and settlement negotiations. *Id.* at 1328. The district judge, however, declined to apply a risk multiplier to the lodestar figure. *Id.*

Not satisfied with these awards, two groups of attorneys, including the PMC, now raise numerous objections on appeal.

II. DISCUSSION

A. *PMC Members*

The district court awarded the individual members of the PMC an aggregate of $4,713,635.50 in fees and $650,356.97 in individual expenses. In addition, the court awarded the PMC, as a whole, expenses in the sum of $1,711,155.87. These attorneys now raise four specific challenges to their individual awards.

1. National Hourly Rates

Faced with a flood of fee petitions from counsel located in all regions of the country, the district court utilized national hourly rates for calculating the fee awards for each attorney. While it recognized that the general rule for fee calculation in this circuit requires the use of "the hourly rate normally charged for similar work by attorneys of like skill in the area," *Grinnell II*, 560 F.2d at 1098, the district court noted that special problems arise "in applying this general standard in a complex multidistrict litigation that is national in scope, involves counsel from all over the country and extends over many years during which the rates for particular lawyers and classes of lawyers are changing," *Agent Orange*, 611 F.Supp. at 1308.

Specifically, the court pointed out that if the general rule were interpreted to require imposition of the rates normally imposed within the district, the rule would make little sense in the context of this action, given that the vast majority of counsel involved were non-local. Alternatively, if the rule were interpreted to require imposition of varying rates depending upon the location of each counsel's practice, the district judge perceived that such a rule would minimize the court's familiarity with the rates to be awarded, require an almost unworkable case-by-case review of such rates, and consistently benefit non-local counsel at the expense of the class fund. The district judge concluded that in large multiparty litigation, where substantial numbers of specialized non-local attorneys are involved, utilization of a national hourly rate is appropriate because it "recognizes the national character of the lawsuit and of class counsel while retaining a vitally im-

portant administrative simplicity together with an essential neutrality of result as between fee applicants and fund beneficiaries." *Id.* at 1309.

Relying on five separate sources, the district court developed the national rates to be applied in this action. First, the court considered data compiled in the National Law Journal Directory of the Legal Profession (B. Gerson, M. Liss & P. Cunningham eds. 1984), a periodical that provided rate information concerning law firms of fifty or more attorneys throughout the country as of March 1983. Second, the court reviewed the submissions of counsel, in particular the defendants' Memorandum Concerning Plaintiffs' Lawyers' Applications for Attorneys' Fees and for Reimbursement of Expenses, which provided further information on national rates. Third, the court reviewed various surveys of law firm economics, dated 1980 through 1984, and other periodicals relating to the manner in which firms bill their clients. Fourth, the court took notice of its own experience in setting fee awards in class actions. Finally, the district judge reviewed recent fee awards by other courts to understand more fully the manner in which other jurisdictions set appropriate rates. *Agent Orange,* 611 F.Supp. at 1325-28 (citing, *inter alia, In re Fine Paper Antitrust Litigation,* 751 F.2d 562, 590 n. 22 (3d Cir. 1984); *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 955-56 (1st Cir. 1984)). From an analysis of this data, the district court arrived at national hourly rates of $150 for partners, $100 for associates and $125 for law professors.

The members of the PMC challenge the use of national rates on the ground that they do not comport with the principles governing attorneys' fee awards in equitable

fund actions. They assert that the practice in this and other circuits required the court to review independently the hourly rate for each attorney in order to ensure that he was compensated at a level commensurate with that of other counsel of like skill in the area in which he practices. *See, e.g., In re Fine Paper,* 751 F.2d at 590-91 (classifying application of national hourly rates as legal error on the grounds that the district court presented no evidentiary basis for their establishment and such rates ignored the market rates that the attorneys would command in their respective communities). Relying on large class action cases in other circuits where courts have awarded varying rates to counsel from different localities, *e.g., In re Equity Funding Corp. of America Securities Litigation,* 438 F.Supp. 1303 (C.D. Cal. 1977), they argue that, while the task may be a difficult one, other jurisdictions routinely undertake it.

[1] In passing on the efficacy of national hourly rates, we note that fees in this action were awarded under the equitable fund doctrine, which seeks to ensure that counsel who have performed services beneficial to the class receive fair and just compensation for their respective efforts. *Trustees v. Greenough,* 105 U.S. (15 Otto) 527, 536, 26 L.Ed. 1157 (1882). In order to provide counsel with such compensation and, at the same time, temper these awards to prevent windfalls, we have adopted a lodestar formula for calculating fees in equitable fund and statutory fee contexts. *Grinnell II,* 560 F.2d at 1099; *Grinnell I,* 495 F.2d at 469-71. Under the formula, the district court initially multiples the number of hours reasonably billed by the hourly rate normally charged for equivalent work by similarly-skilled attorneys in the area. *Grinnell II,* 560 F.2d at 1098. Once calculated, the dis-

trict court then may, in its discretion, upwardly or downwardly adjust this figure by considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issues. *Id.*

While at least one circuit looks to the rates employed in the area in which the attorney practices, *Cunningham v. City of McKeesport,* 753 F.2d 262, 267 (3d Cir. 1985), we traditionally have interpreted *Grinnell I* and *Grinnell II* as requiring use of the hourly rates employed in the district in which the reviewing court sits. *Polk v. New York State Department of Correctional Services,* 722 F. 2d 23, 25 (2d Cir. 1983). We generally have adhered to this rule whether the attorney involved was local or non-local. *Id.; accord Donnell v. United States,* 682 F.2d 240, 251-52 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1204, 103 S.Ct. 1190, 75 L.Ed.2d 436 (1983); *Chrapliwy v. Uniroyal, Inc.,* 670 F.2d 760, 768-69 (7th Cir. 1982), *cert. denied,* 461 U.S. 956, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983); *Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 140-41 (8th Cir. 1982) (en banc). We and other circuits have strayed from this rule only in the rare case where the "special expertise" of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed. *Polk,* 722 F.2d at 25; *Avalon Cinema,* 689 F.2d at 140-41.

[2] Accordingly, the issue for review here is whether the district court erred in deviating from this established precedent. While we concede that such conduct in the ordinary case would constitute legal error and require recalculation of the lodestar, we conclude that, in an exceptional multi-party case such as this, where dozens of

non-local counsel from all parts of the country are involved, public policy and administrative concerns call for the district court to be given the necessary flexibility to impose a national hourly rate when an adequate factual basis for calculating the rate exists.

An examination of the alternatives to the use of national rates in large multiparty class actions of this sort readily establishes the necessity for affording district courts this discretion. Use of our forum rule would distort dramatically the purposes of the lodestar calculation itself—to ensure fair and just compensation to counsel and to prevent the award of windfall fees. This distortion would occur because, in cases in which the vast majority of attorneys involved are non-local, the forum rule necessarily will either overcompensate or undercompensate a substantial number of non-local attorneys. Undercompensation could deny counsel their right to fair and just fees; overcompensation would not be consistent with the need to prevent windfalls. Adherence to the forum rule in cases in which the inherent limitations of the rule are magnified, i.e., where few local counsel and vast numbers of non-local counsel are involved, therefore, makes little sense.

Resort to a varying approach, depending upon the area in which the individual practices, fares no better. In an action of the magnitude of *Agent Orange*, in which well over one hundred fee petitions were filed by counsel throughout the country, such an approach would pose an administrative nightmare for the district court. As the district judge here noted, "[s]implicity becomes an especially important goal in a complex case involving a hundred or more fee applications and tens of thousands of

pages of supporting documentation and requiring a number of years for prosecution during which rates for particular attorneys and geographic locations change in different ways." *Agent Orange,* 611 F.Supp. at 1308. While administrative interests normally should not be the primary concern of a court in formulating substantive rules of review, we observe that the attorney-by-attorney approach recommended by the PMC simply would over-tax the capacity of a district court to review fee petitions adequately. *Cf. New York Association for Retarded Children v. Carey,* 711 F.2d 1136, 1146 (2d Cir. 1983) (burden-saving measures may be taken by district court in light of voluminous fee petitions).

Although not a panacea, the use of national hourly rates in exceptional multiparty cases of national scope, where dozens of non-local counsel are involved, appears to be the best available method of ensuring adherence to the principles of the lodestar analysis. The risk of over-compensation or undercompensation on a large scale, apparent under the forum rule, is somewhat neutralized, while, at the same time, the administrative burden on the district court, apparent under the varying rate rule, is reduced to a manageable level. In granting the district court this discretion, however, we caution that such rates should be employed *only* in the exceptional case presenting problems similar to those presented here. We further caution that, even in similar cases, national hourly rates should be employed only when the district court is presented with an adequate evidentiary basis on which to fix such rates. Once the court is satisfied with the evidence, it should make clear, factual findings that support its determination.

We are aware that at least one circuit has rejected the imposition of national hourly rates on the ground that they do not comport with the lodestar principle. *In re Fine Paper,* 751 F.2d at 591. To the extent, however, that the Third Circuit's decision was based upon the fact that the national rates employed did not comport with that circuit's rule requiring the hourly rate to reflect the rate normally charged in the locale in which counsel practices, we already have rejected its analysis by following a forum rate rule. *See Polk,* 722 F.2d at 25. In addition, *In re Fine Paper,* though not entirely clear on this point, may be read to condemn only national hourly rates not based on an adequate evidentiary record. The Third Circuit, in reversing the district court's adoption of such rates, indicated that the district court there had not referred to any evidence supporting the existence of such rates, 751 F.2d at 590, and noted that "the subject is not one on which judicial notice is appropriate," *id.* If read in that context, our decision is in accord with that of the Third Circuit, since we limit the utilization of national rates to those instances in which an adequate evidentiary basis exists. Finally, even assuming that *In re Fine Paper* stands for an absolute prohibition on the imposition of national hourly rates, we note that, subsequent to that decision, the Third Circuit Task Force on Court Awarded Attorney Fees, organized at the behest of the Chief Judge of that Circuit, recommended that the court permit the utilization of such rates in exceptional cases. *Court Awarded Attorney Fees,* Third Circuit Task Force, 108 F.R.D. 237, 260-62 (Oct. 8, 1985).[1]

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1. The Task Force made its recommendation in the context of certain statutory fee cases. It also recommends the abolition of the lodestar formula for equitable fund cases and suggests such fees be based upon a percentage of the recovery. 108 F.R.D. at 254-59.

[3] Given our determination that the utilization of national hourly rates in limited circumstances is proper, we further conclude that the district court did not abuse its discretion in calculating the specific hourly rates in the present case. In its decision, the court set forth the five bases upon which it computed these rates. The PMC does not challenge specifically those bases and we find little reason to question them. Hourly rates for counsel in this action were difficult to calculate because the majority of attorneys involved normally would have been compensated through contingency fee arrangements rather than on an hourly basis. Difficulties aside, however, the district judge, in our view, took adequate steps to ensure a fair and just hourly rate of compensation. We therefore hold that the national hourly rates of $150 for partners, $100 for associates and $125 for law professors constituted an element of fair and just compensation for counsel in the context of this case.

2. Quality Multipliers

Having computed the initial lodestar figure, the district court awarded discretionary quality multipliers of 1.5, and in one case 1.75, to six members of the PMC on the ground that these attorneys had exhibited exceptional skills in the litigation and settlement negotiations. The six PMC recipients now challenge the level of the multipliers as being unjustifiably low and further challenge the district court's failure to award quality multipliers in connection with the fees of the three other PMC members.

[4] The decision to allow a quality multiplier rests in the sound discretion of the district court, *Hensley v. Eck-*

erhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed.2d 40 (1983); *Grinnell II,* 560 F.2d at 1098, due to "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley,* 461 U.S. at 437, 103 S. Ct. at 1941. The Supreme Court, however, in *Blum v. Stenson,* 465 U.S. 886, 899, 104 S. Ct. 1541, 1549, 79 L.Ed.2d 891 (1984), and more recently in *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air,* ___U.S.___, 106 S. Ct. 3088, 92 L.Ed.2d 439 (1986), has severely restricted those instances in which a district court may allow such a multiplier.[2]

In *Blum,* a decision concerning application of the lodestar analysis to a fee award under 42 U.S.C. § 1988, the Court determined that factors such as quality of representation are *presumed* to be fully reflected in the initial lodestar figure, derived by multiplying the number of hours reasonably billed by the court-established hourly rate. *Blum,* 465 U.S. at 899, 104 S. Ct. at 1549. Accordingly, the Court concluded that an adjustment to the lodestar figure for such a factor would only be proper in "the *rare* case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was *'exceptional.'* " *Id.* (emphasis added). In *Delaware Valley Citizens' Council,* a decision concerning application of the lodestar analysis

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2. *Blum* and *Delaware Valley Citizens' Council* are statutory fee cases whereas here fees were awarded under the equitable fund doctrine. While the lodestar formula applies to both types of cases, equitable fund cases may afford courts more leeway in enhancing the lodestar, given the absence of any legislative directive.

to a fee award under section 304(d) of the Clean Air Act, 42 U.S.C.A. § 7604(d) (West 1983), the Court reaffirmed the narrow approach taken in *Blum,* declaring that calculating fee awards under the lodestar analysis "leaves very little room for enhancing the award based on [counsel's] post-engagement performance." *Delaware Valley Citizens' Council,* 106 S. Ct. at 3098.

[5] Given these pronouncements, the issue, in our view, is not whether the quality multipliers awarded by the district court here were set too low, but rather whether they should have been awarded at all. In what we consider to be a close case, we conclude that the district court did not abuse its discretion in awarding the multipliers for quality to six of the PMC members, or in failing to award them to the other three members.

The district court specifically found that these six attorneys, as well as several outside counsel who have not appealed, deserved to be awarded quality multipliers at various rates because each had "demonstrated an unusual degree of skill in presenting complex and often novel issues to the court," *Agent Orange,* 611 F.Supp. at 1328, or had "shown a level of organization and efficiency that goes beyond what is usually expected," *id.* Under ordinary circumstances, even assuming the high level of work performed by counsel here, we would be constrained to reverse the district court's award in light of the severe restrictions set forth in *Blum* and *Delaware Valley Citizens' Council.* While the work indeed may have been of high quality, the presumption is that such factors already are reflected in the initial lodestar figure.

In this case, however, we find that the use of a national hourly rate skews the normal lodestar analysis enough

to require consideration of quality factors in order to satisfy the requirements of just and fair compensation. While we affirm the use of national rates in the present case, we realize that such rates inherently cannot be calculated as precisely as those under the forum rule, or those under the varying locale rule. Consequently, the *Blum* and *Delaware Valley Citizens' Council* presumption of inclusion of quality factors within the initial lodestar figure should not, in our view, apply to those instances in which the district court utilizes this less precise analysis.

3. Risk Multiplier

The district court declined to award a risk multiplier to any attorney involved in the case. It reasoned that risk of success should not be judged solely from the vantage point of whether a complete recovery at the conclusion of the action is viable, but also should include an evaluation of the likelihood that the parties will reach a settlement. In this regard, the court noted that it was probable that the defendant chemical companies would settle the case "to avoid the further burden of litigation and to improve their respective financial pictures." *Agent Orange*, 611 F.Supp. at 1311. The court also recognized that awarding risk multipliers in a case such as *Agent Orange*, which held out little chance for a victory on the merits but a significant chance of settlement, would fuel the filing of nuisance litigation "in which settlement becomes the main object and attorney fee awards an overpowering motivating force." *Id.*

Furthermore, the court indicated that strict application of inversely proportionate risk multipliers to cases such as *Agent Orange*, which it described as a high-risk case of highly questionable merit, would lead to a confounding

disparity in the treatment of cases falling just above and just below the standard for frivolousness under Fed. R. Civ. P. 11. Attorneys in successful cases bordering on the frivolous, yet falling just above the proscriptions of Rule 11, would be awarded the highest risk multipliers, since the risk of success in such cases obviously would be great. In contrast, counsel in similar cases falling just below Rule 11's proscriptions, would not only receive no risk multiplier, but also would be subject to court-imposed sanctions for having brought such a case.

Finally, the court took note that, as a matter of public policy, the need to utilize a risk multiplier in a given case must be viewed in relation to the equally important concerns of judicial administration and legal morality. To this end, the refusal to allow a multiplier here would force the legal community "to think at least twice before initiating sprawling, complicated cases of highly questionable merit that will consume time, expense and effort on the part of all concerned, including the courts, in a degree vastly disproportionate to the results eventually obtainable." *Id.* at 1312. While such a policy would not reward the filing of these questionable cases, the court did note that counsel's entitlement to a lodestar award without a multiplier would nonetheless serve adequately to encourage attorneys to represent plaintiffs in cases of this nature.

The PMC challenges the district court's failure to allow a risk multiplier on the fround that it does not comport with principles of just and fair compensation. While conceding that plaintiffs' cases would have been difficult to prove, the PMC members strongly take exception to the district court's description of the action as being of dubious or questionable merit. As to the probability of

the parties reaching a settlement in the action, the PMC members point to the fact that such a settlement was not reached until the eve of trial, and label as "economic suicide" the notion that they advanced funds and spent thousands of hours working on the case with some inner assurance that defendants would make a reasonable settlement proposal because of the bothersome nature of the litigation.

[6] We have labeled the risk-of-success factor as "perhaps the foremost" factor to be considered under the second prong of the lodestar analysis. *Grinnell I*, 495 F.2d at 471. The multiplier takes into account the realties of a legal practice by rewarding counsel for those successful cases in which the probability of success was slight and yet the time invested in the case was substantial. *Id.; see* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1803, at 524-27 (1986). As the chance of success on the merits or by settlement increases, the justification for using a risk multiplier decreases. *Grinnell I*, 495 F.2d at 471. The need for this type of multiplier is magnified when the "diminutive character of the individual claims" forces counsel to bring the action on a class basis. 7B C. Wright, A. Miller & M. Kane, *supra*, § 1803, at 527. Without the prospect of some consideration for the risks and uncertainties of the action, "the necessary incentive [for prosecuting such a suit] would be lacking and a major weapon for enforcing various public policies would be blunted." *Id.*

The problem with risk multipliers, however, is that they tend to reward counsel for bringing actions of dubious merit. If such multipliers are awarded on a perfectly proportionate basis, i.e., the greater the chance that the case

would not succeed theh higher the multiplier, "the net effect . . . would be to make a marginal case as attractive to bring as a very strong case." *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488, 87 L.Ed.2d 622 (1985). This in turn, would provide an incentive for counsel to flood "the courts with unmeritorious litigation," *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), "leading . . . to a situation in which every conceivable claim would be litigated, subject only to the ability of the courts to handle the burden," *Laffey*, 746 F.2d at 27; *accord* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 491 (1981). The net result, of course, would be a dilution of the judiciary's ability to handle those cases with potentially meritorious claims.

[7, 8] A court, therefore, in adjudging whether to award a risk multiplier, should examine closely the nature of the action in order to determine whether, as a matter of public policy, it is the type of case worthy of judicial encouragement. In our view, the case here clearly is not and, consequently, we agree with the district court's decision not to impose a risk multiplier.

From the outset, the factual and legal difficulties hindering the successful prosecution of plaintiffs' case have been staggering. Factual evidence of causation has been at best tenuous and, if not for the last-minute settlement, the military contractor defense would have prevented class members from realizing any recovery at all. When these significant weaknesses in plaintiffs' case are viewed in light of the sheer magnitude of the action and the thousands of hours of court time that this type of

action requires, it becomes clear that the federal courts should not actively encourage the bar to file such dubious actions in the future.

Besides matters of public policy, the settlement itself presents a rationale for denying counsel's request. While today we hold that the settlement falls within the range of reasonableness under Fed. R. Civ. P. 23, we are aware that the $180 million settlement provides a very small return to the class in light of the claims asserted. In our estimation, the relatively small size of the settlement reflects class counsel's realization of the extreme difficulty they would incur in overcoming the inherent weaknesses of their case, in particular the military contractor defense, and the defendant chemical companies' realization that they could end a burdensome litigation at very low cost. Award of a risk multiplier in such circumstances, as the district court reasoned, only would further the unwelcome prospect of nuisance litigation being brought in federal courts.

In denying class counsel their requested multiplier, we note that each attorney has received the fair value of his services to the class under the lodestar analysis. An additional award of a risk multiplier not only would provide excessive compensation but would encourage counsel to accept similar matters for litigation in the future. We find no reason to do more to encourage litigation that could substantially occupy the federal judiciary in matters of little merit.

4. Hours and Expenses

The PMC members challenge the district court's guidelines on the grounds that they improperly failed to credit

certain hours and reimburse certain expenses. Specifically, they challenge the court's decision to disallow fifty percent of the time spent on reading scientific literature, to disallow fifty percent of the time spent on travel, to disallow a portion of the time spent reviewing mail and on the telephone, to disallow fifty percent of the time spent reviewing depositions, and to disallow a substantial amount of post-settlement work. As to expenses, they challenge the court's decision to reduce expenses by a percentage when such expenses could not be connected with compensable activity, to set a maximum fee for non-causation expert witnesses, and to treat paralegals as a cost. In sum, they allege that, taken together, if not separately, such radical deductions in their hours and expenses billed constituted an abuse of the court's discretion.

[9] The district court is given broad discretion in setting fee awards. *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941, *Carey*, 711 F.2d at 1146. We cannot reverse a district court's finding in this regard merely because we might have weighed the information provided in the fee petitions differently or might have found more of the hours billed as being beneficial to the class. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985). The district judge is in the best position to weigh the respective input of counsel, considering its "superior understanding of the litigation." *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941. Accordingly, we will reverse a district court's findings as to which hours to compensate "only when it is apparent that the size of the award is out of line with the degree of effort reasonably needed to prevail in the litigation." *Carey*, 711 F.2d at 1146.

[10-12] We find no abuse of discretion here. The critical inquiry when reviewing hours billed to the common fund in a class action is whether the work performed resulted in a benefit to the class. *See Grinnell II*, 560 F.2d at 1099. In determining which hours were beneficial, we note that there "are no hard-and-fast rules," *Seigal v. Merrick*, 619 F.2d 160, 164 n. 9 (2d Cir. 1980), but that "[a]mple authority supports reduction in the lodestar figure for overstaffing as well as for other forms of duplicative or inefficient work," *id.* Moreover, we and other circuits have held that in cases in which substantial numbers of voluminous fee petitions are filed, the district court has the authority to make across-the-board percentage cuts in hours "as a practical means of trimming fat from a fee application." *Carey*, 711 F.2d at 1146; *accord Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 766 F.2d 646, 657 (7th Cir. 1985); *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (in banc). *But see In re Fine Paper*, 751 F.2d at 596 (court must identify with some specificity any disallowed hours). Under such circumstances, no item-by-item accounting of the hours disallowed is necessary or desirable. *Ohio-Sealy*, 776 F.2d at 658.

Here, the fee petitions, to say the least, were voluminous, consisting of tens of thousands of pages of billing sheets and other exhibits. To suggest that the district court could not take advantage of percentage reductions in such a context would be absurd. In reviewing these across-the-board cuts, we find nothing that we could classify as an abuse of discretion. Moreover, it is not unusual for hours of travel time, deposition time and other quasi-administrative items to be compensated at lower rates. *E.g., Sun Publishing Co. v. Mecklenburg News, Inc.*, 594 F.Supp.

1512, 1520 (E.D. Va. 1984); *Steinberg v. Carey,* 470 F.Supp. 471, 479-80 (S.D. N.Y. 1979). *But see Crumbaker v. Merit Systems Protection Board,* 781 F.2d 191, 193-94 (Fed. Cir. 1986) (reasonable travel time should be compensated at the same rate as other working time). The district judge gave reasons, though somewhat generalized, for each percentage cut that he made. We find these to be an adequate reflection of the benefit that the class derived from counsel's work.

[13, 14] We also find no abuse of discretion in the district court's guidelines for expenses. Counsel are entitled to reimbursement only for those expenses incurred in the course of work that benefitted the class. *In re Armored Car Antitrust Litigation,* 472 F.Supp. 1357, 1388-89 (N.D. Ga. 1979), *modified and remanded on other grounds,* 645 F.2d 488 (5th Cir. 1981). Overstaffing and other extravagances are not recoverable. *Id.*

[15-17] Given this standard, the district court's finding that the reports of the noncausation witnesses were of only marginal use to the class and were "uniformly inadequate" suggests that the court in fact was generous in setting the cap for fees to these experts at $5,000 each. Report and Recommendation of United States Magistrate, Re: Fee Petitions, *appendixed to and incorporated in Agent Orange,* 611 F.Supp. 1296, 1351 (1985). We also find no abuse of discretion in the district court's determination that expenses connected with those hours disallowed as not being beneficial to the class should not be reimbursed. *See In re Fine Paper Antitrust Litigation,* 98 F.R.D. 81, 85 (E.D. Pa. 1983), *rev'd on other grounds,* 751 F.2d 562 (3d Cir. 1984). Finally, although we concede that under certain circumstances it may be appropri-

ate not to treat paralegal time as an expense in a large class action, *see Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 374-75 (E.D. Pa. 1976), we note that the district court in so doing was simply following our prior directive, *see Grinnell I*, 495 F.2d at 473. We decline to reevaluate that rule here.

B. *Outside Counsel*

1. Ashcraft & Gerel

Ashcraft & Gerel, a Washington, D.C. law firm that assisted the PMC in this action between March of 1983 and October of 1983, appeals the district court's fee and expense award. In its initial fee calculations, the district court awarded Ashcraft & Gerel fees in the amount of $78,935 and expenses in the amount of $46,233.18. The district court limited the fees and expenses to the work performed between the above dates. Pursuant to the recommendation of the Magistrate, Ashcraft & Gerel's fee and expense awards then were increased to $138,788 and $54,897.39. This increase primarily reflected the recommendation of the Magistrate that review of Ashcraft & Gerel's work not be limited to the short time period, but should include as well the period prior to March of 1983.

The Magistrate's recommendation, adopted by the district court, also reflected a negative quality multiplier of .25 on the ground that in 1983 the firm had withdrawn from the litigation when the PMC refused its request to be given exclusive control of the action. When the firm withdrew, other counsel involved were forced to perform numerous services that Ashcraft & Gerel already had performed. The Magistrate thus concluded that the firm

"failed to discharge [its] burden when it decided to cease work on the case, thereby requiring other attorneys to duplicate its work." *Agent Orange,* 611 F.Supp. at 1367.

In adopting the Magistrate's recommendations, however, the district court offset the fee awarded to Ashcraft & Gerel against the benefits obtained by the firm's many opt-out clients from "the use of discovery materials assembled through the multidistrict discovery process and paid for by the class." *Id.* at 1343. The district court further found that the value of such services for the opt-outs far exceeded the firm's services to the class. Consequently, the court abrogated any fee award to the firm, but maintained the modified expense award.

[18, 19] While we find that the district court's award of fees and expenses prior to abrogation reflects fair and just compensation for Ashcraft & Gerel's services to the class, we conclude that abrogation of the fee award constituted an abuse of discretion. In analyzing the general problem of individual use of discovery materials, the district court properly determined that, in return for the use of discovery materials obtained in the multidistrict litigation, such individual plaintiffs "could be assessed a reasonable fee, to be paid back into the fund as their fair share of the legal expenses assumed by the class." *Id.* at 1317. The court then suggested two ways in which this could be done. First, the court could require counsel in the opt-out cases to report to the district court any fee received from the opt-out plaintiffs so that the court could deduct the appropriate amount. *Id.* Second, the court could assess the opt-out plaintiffs for the cost of the discovery at the time they made use of it. *Id.*

Neither of these means of assessment permitted the court to offset Ashcraft & Gerel's opt-out clients' pay-

ments for use of discovery materials, against fees awarded to the firm for its representation of *class members.* The fee awarded the firm here has no relation to services performed for the opt-outs. Abrogation of the fee, therefore, has the net effect of relieving the class from its responsibility to pay Ashcraft & Gerel fair and just compensation for services it provided, rather than assessing the *opt-out plaintiffs* for use of the discovery materials.

Accordingly, we conclude that Ashcraft & Gerel should be awarded the fee that the district court, accepting the Magistrate's recommendation, determined to be fair and just.

2. Sullivan & Associates

Sullivan & Associates, a law firm primarily involved in the litigation during the early days of the action, challenges the district court's fee award on the ground that the court improperly determined that much of its work was not beneficial to the class. The district court awarded the firm $52,311 in fees and $20,573.08 in expenses. The court, upon the recommendation of the Magistrate, denied the firm's motion to supplement the award. The court found that the hours requested were excessive and that the firm had spent most of its time furthering the interests of its opt-out clients.

After reviewing the district court's calculations, we conclude that there was no abuse of discretion. The district court was in a much better position to determine whether the work performed by the firm benefitted the class. For the same reasons as given in section II(A)(4), *supra,* we find no basis upon which to question the district court's figures.

3. Australian Counsel

William T. McMillan, Ross V. Lonnie, Paul J. Davison, Roger L. MacLaren, and Michael S. Bigg, all Australian attorneys, appeal the district court's award of fees and expenses. The district court awarded McMillan $3,650 in fees and $27,178.34 in expenses, Lonnie no fees and $3,055.93 in expenses, Davison no fees and $2,042.08 in expenses. MacLaren no fees and $3,683.39 in expenses, and Bigg $5,700 in fees and $22,561.76 in expenses. The basis for the challenge to these awards is that they do not adequately reflect the services that counsel performed for the class.

We again find no abuse of discretion. Appellants have given us no adequate reason to question the district court's calculations and we decline to do so.

4. Kraft & Hughes

Kraft & Hughes, a New Jersey firm peripherally involved in the litigation, challenges the district court's award. The court awarded the firm $2,425 in fees and $3,935.48 in expenses. The firm now argues that this is no more than the out-of-pocket costs of its involvement and substantially undercredits its contribution to the litigation. Moreover, the firm contends that it was improper for the district court to abrogate the contingency fee agreements that the firm had with a number of class members.

Kraft & Hughes concedes in its presentation to this court that it cannot establish the factual findings of the district court to be clearly erroneous. Consequently, the firm bases its appeal primarily on the ground that its fee agreements with its clients, as a matter of law, should

not have been abolished. We find this argument, however, to be without merit.

[20, 21] It is well established that a district court, pursuant to its rulemaking authority or on an *ad hoc* basis, may review a contingency fee agreement. *Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 896 (1st Cir. 1985); *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979). When dealing with an equitable fund action, "the court has an even greater necessity to review the fee agreement for [Fed. R. Civ. P. 23(e)] imposes upon it a responsibility to protect the interests of the class members from abuse." *Dunn*, 602 F.2d at 1109. That is exactly what the district court did here in requiring counsel, prior to receiving fees from the settlement, to certify that he or it had retained no fees or expenses from any class members. We find no basis to overrule the district court's decision in this regard.

III. CONCLUSION

To summarize: we affrm the district court's utilization of national hourly rates and conclude that they may be used in the circumstances revealed here. We further affirm the district court's award of quality multipliers to various counsel, and the district court's denial of risk multipliers. We affirm the district court's decision regarding hours credited and expenses reimbursed to the PMC. We reverse the decision to offset Ashcraft & Gerel's fee against the use of the multidistrict discovery materials by the firm's opt-out clients and order the reinstatement of the previously approved fee without allowance for a risk multiplier. As to all other aspects of the district court's decision respecting attorney's fees, we affirm.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL 381

"AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

(Filed June 4, 1985)

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT

NEWTON B. SCHWART being duly sworn, deposes and says:

I am a stockholder and member of the professional corporation NEWTON B. SCHWARTZ, P.C. In such capacity I am a member of the Agent Orange Plaintiffs' Management Committee. I make this affidavit in opposition to the application of David J. Dean to set aside the Fee Sharing Agreement executed by members of the "AOPMC" (as the Plaintiffs Management Committee is hereinafter referred to).

This affidavit does not seek to alter, amend or modify in the slightest way the "AOPMC AGREEMENT" ("The Agreement"), except that as stated in the Motion of the "AOPMC" to Compel Arbitration of the fee sharing agreement as amended ("THE AGREEMENT") and in the Memorandum of Law in Support of the Motion of the "AOPMC" excluding Dean of course, that this Court is without jurisdiction to hear or entertain the same in any way under recent decisions of the U. S. Supreme Court holding that the Federal Arbitration Act was mandatory in its language and requires District Courts to compel arbitration of pending arbitrable claims.

I do not seek to reduce by any amount under "THE AGREEMENT" as agreed upon therein by all signatories thereto including DEAN. "THE AGREEMENT" would not invalidate this Court's mandate and would enforce what all of the parties thereto, including DEAN knowingly agreed to and enabled the AOPMC to participate in the prosecution to the results obtained on May 7, 1984 and in the implementation thereof after said date to the present. As set forth in detail herein, contributions of both substantial time, talent and energies as well as finances are currently being required by the present seven members of the "AOPMC". DEAN has consistently refused to participate and now declines to participate in any of the large financial burdens being shouldered by the remaining seven members other than himself. They all unanimously stand by their agreements. Stephen J. Schlegel the primary case manager, who was rightly commended by this Court for his performance in this case, stands by "THE AGREEMENT" although he may, as Dean partially correctly points out in his affidavit (at p. 1 thereof) he may be unfavorably impacted "by more

than one half million dollars". Even former member Benton Musslewhite candidly acknowledged his intention to be bound by "THE AGREEMENT" in open Court before Your Honor on or about February 7, 1985 even though he was then withdrawing from the "AOPMC" for philosophical differences respecting the settlement with which no "AOPMC" member questions his sincerity. As shown herein, the impact percentagewise upon Benton Musslewhite and The Law Offices of Benton Musslewhite ("LOBM" collectively hereinafter) is even more pronounced percentagewise, were that a relevant fact as Dean implies.

To invalidate "THE AGREEMENT" freely negotiated and executed and even later modified by and between able and experienced counsel, not clients and not at all affecting the clients, will do more than have a chilling effect upon future class actions of a doubtful or questionable liability nature, as this was. It will be the death knell to effective representation by competent counsel. This case has already taken its toll. One "AOPMC" member, John O'Quinn, one of the most able and successful counsel in the United States, stated to the Court that "this was my last class action". This is regrettable. Because counsel of John's class and competence and zeal in preparation and skill do not often come down the pike, as we say. And that was even before the Dean Motion to invalidate. The undersigned is involved in other class action litigation. Were Dean to be successful, future participation in such litigation would become out of the question, for reasons totally ignored by Dean and his counsel, but regrettably present in the real world.

My firm's and my (collectively hereinafter "NBSPC") involvement with this litigation began in late 1979 and

initially aborted in 1982. It was derivatively through "LOBM".

He had been invited into the litigation. I attended several meetings both in Long Island and one in Houston with the person whom I thought was the lead counsel and in charge generally, Victor John Yannacone, Jr. and some of the members of the Long Island consortium of lawyers. During this two year period my participation consisted primarily of obtaining and evaluating medical records on personal clients of "LOBM", filing and reviewing pleadings in the local Texas cases filed and in financing "LOBM's" participation in the Yannacone & Associates consortium.

Frankly, I do not recall any particular dealings with David J. Dean during this period, but did not understand that he was to be "Chief Trial Counsel" during this period of time. (Dean affidavit at p. 1). After several years, because of the combination of the following events, my firm ceased any participation in the litigation until May, 1983:

1. The lack of organization of Yannacone & Associates ("Y&A").

2. The dominance of Victor J. Yannacone in what I perceived to be well meaning, but misguided directions. The emphases were upon organizing the veterans, bringing them into the litigation with a commendable crusading zeal which only Victor can do, to his credit, and the concomitant lack of meaningful discovery and preparation even for the limited issues to be tried under then Presiding Judge Pratt's orders.

3. Lack of meaningful financing with each member contributing what he could or was able to do, which is

not to criticize any member of "Y&A". Their valiant efforts held the litigation together and warded off the chemical company foes, obviously vastly superior in resources, until the "AOPMC" cavalry could arrive in the fall of 1983.

In March, 1983 "LOBM" held a meeting with my firm and the other Houston firm which had participated to some extent in financing his participation in this litigation, Friedman & Chaffin. His views were (1) to revive both of our participation which then was each under $40,000.00 principally to "LOBM" (all of these expenditures are itemized and supported on the "Application for Reimbursement of Fees and Expenses" on file herein and will not be repeated in detail even as to the $250,000.00 borrowed funds which were contributed, as Dean acknowledged as to each of six present "AOPMC" members) (Dean affidavit at p. 9 et seq.) and (2) and that "Y&A" were floundering and on their way out.

Further that there would be financial inducements to re-entering the litigation, including being able to participate at the national level as opposed to merely on local cases of "LOBM" as our participation had been in the prior period of involvement. He mentioned that he would be one of the new proposed committee to prosecute the case and that David Dean was replacing Victor Yannacone as Plaintiff's Court spokesman. He continued to use Melvin Block of Brooklyn in association with a Philadelphia attorney whose name I cannot recall (perhaps Garuselski or a similar sounding name) as liason for him. My firm re-entered the litigation when I participated in a meeting at Irving Like's office in Babylon in mid July. NBSPC began making $5,000.00

per month contributions to either LOBM or one was made to Levine & Grossman in New York c/o or for "Y&A". The cancelled checks are attached to the aforedescribed "Application for Reimbursement etc.", commencing with one for $15,000.00 on April 15, 1983. On May 2, 1983 our check to Levine & Grossman was deposited in an account "Y&A And Trial Associates" at Mfg Hanover.

Because of his subsequent personal difficulties, I insisted that Benton sever ties with Melvin Block, which he reluctantly did although agreeing to pay Block himself as Benton is wont to do. The mid July 1983 meeting at Babylon was a shouting contest principally between Victor Yannacone and Albert Fiorella, Jr. Dean was present and did not as I recall acknowledge being either Court spokesman or Chief Trial counsel. This date I point out as the nadir or low water mark in the fortunes of this litigation from the Plaintiffs view point. It was also the date (about July 16, 1983) that I called Mr. Pete Johnson, a member of the New York bar, who had been highly recommended by Al Fiorella, Jr. It was brief. He knew Robert Strauss, former national Democratic Committeeman from Dallas under President Carter and a presidential trouble shooter. The gist of my conversation with him, and it was mutually exploratory, was that he had the manpower and resources to commit to picking up the pieces and preparing the case for trial. The other side of the coin was that he wanted full charge of the case and the removal of Dean. David was the only person he specified by name as I recall. I related this immediately by phone to Stephen Schlegel in Chicago and asked that he follow up on it. I also reported it to Benton and Al Fiorella.

Johnson, based upon Fiorella's information, and that gleaned from a cursory inquiry about him, was one of the few attorneys who had both the capability, financial ability and desire to enter the litigation. He was also sensible enough to recognize the obstacles and expressed no eagerness in my one telephone conversation with him. I was of the opinion based upon this conversation and Fiorella's and others information, all very positive, that the better course for the class and the clients would be to persuade Johnson to take over the litigation even if it did mean a relegated role for my firm and "Y&A" and others not even participating in the preparation or trial.

Incidentally Friedman & Chaffin declined to re-enter or participate in this litigation after the March meeting in Houston, with Benton. Their firm, as John O'Quinn later, arguably, had the wherewithall to carry the litigation, but it would have been at the expense of all of their other clients. Since their reasons for not re-entering had nothing to do with DEAN, suffice it to say that it was because of "LOBM" and the high risks involved.

To demonstrate our firm's good faith, I obtained a commitment from Unitedbank in Houston to issue a 'clean' (i.e. irrevocable) letter of credit for $200,000.00 on which the Committe in this litigation could draw. I showed it to David Dean and left him a copy of it. It was at Special Master Sol Schreiber's office in New York and was the same day, as I recall, that Ashcraft & Gerel attempted their power play. Either Rob Taylor or Wayne Mansula (who were the two from their firm whom I knew) wanted exclusive control of the case. Upon being refused, they either left the conference room or were asked to leave in a not polite manner and told

what they could do. Dean and I discussed the limited role I could play in the case at that time in point of time because I was then the only lawyer in our professional corporation. I told David that I let our one young associate go in April and was interviewing for another but that I could do some 'spot' work until I had employed additional lawyers whom I was interviewing. He said this was fine, totally acceptable. We then discussed what the financial reward or remuneration would be for future financial contributions. I told him that our contributions in the past to Benton approximated $50.-000.00 over the past almost four years. We then discussed for the first time a 2-1 to 4-1 multiplier on all contributions made, to be recovered at the time of settlement or collection of judgment. This was about September 1983. I recall specifically discussing at some point while he was still Special Master, this proposed multiplier for the high risk involved in the litigation with Sol Schreiber. It was in the nature of whether we should get judicial approval from Judge Pratt and disclose it to him early on, rather than wait to the conclusion of the case. He suggested (1) that we borrow the funds from a bank. Of course no bank would loan money except based upon the guarantees of the borrower. Even after the May 7, 1984 settlement, Riggs National Bank, controlled by Houstonian Joe Allbritton, declined to loan a million dollars, and some of our members of the "AOPMC" declined to guarantee the note jointly and severally but wanted only to guarantee a portion thereof; and (2) that we not broach or disclose the arrangement to Judge Pratt. Dean immediately concurred against disclosure.

We finally agreed upon a 3-1 return that was being offered to other attorneys, including all of the subsequent

participants by Benton, David Dean (specifically to Phillip Brown of San Francisco) and by myself in attempting to recruit other able lawyers who had both the time, talent, energy and finances to participate, it was not memorialized until December 1983.

Since money was desparately needed to pay basic expenses of depositions, travel, experts, etc. my firm began borrowing the money and contributing it monthly commencing on or about October 4, 1983 at the monthly rate of $12,500.00. Thus by the time the original Agreement was executed each of six of us had each contributed on average approximately $37,500.00 or a total of $225,000.00. All during this interim period there was never an intimation from Dean or anyone else that the verbally represented and agreed upon 3-1 return would not be executed in writing as a part of the Agreement and honored at the time of collection or successful conclusion of this litigation if that ever in fact occurred. Each of us was aware that this was the most speculative, high risk, 'pie in the sky' venture we have ever embarked upon. At no time did David Dean discourage any participant or decline to spend our contributions which were financing his activties as well as LOBM's and Stephen Schlegel's as well as the "AOPMC'S".

At no time did he or Professor Friedman warn anyone that our purpose in financing Dean, Schlegel and Musslewhite and others was so that they could spend large numbers of hours for which they would alone be compensated at substantial multipliers and that we six who invested $1.5 million dollars would a year or two or three years later receive the return *of* our money, with nothing returned on it, except such hours as we were able

to spend assisting our three financed lead counsel as well as our own participations in the case.

At no time did David Dean or Professor Friedman counsel us that our "AGREEMENT" violated the Code of Professional Responsibility and Federal Class Action law and was invalid and that Dean would move to set it aside as soon as he was awarded the largest fee by the Court. Had any of the foregoing been even hinted at, no one of the six of us contributing, most with borrowed funds for which we were personally liable, would have even remotely considered such an insane act. Had we done so we would have been ripe subjects for commission to a financial "Bellview".

During these early stages of formation of the present "AOPMC" the 3-1 was quickly resolved as "the return" and so represented to all participants and potential participants. Even at this time, I stated that Pete Johnson might still be the more viable alternative, including to Dean on several occasions. Evidentally there was some animosity between the two of them of which I was not aware (other than Johnson's remarks, ante at p. 6). Dean continually re-emphasized that this would result not only in his relegation to a minor role, if any, but that there would be no 3-1 if Johnson took over the litigation. Because of the inordinately high risks of this litigation, based upon my thirty years experience, I kept the possible participation of Johnson open until the fall of 1983, with Dean's knowledge.

On or about October 13, 1985 Judge Pratt asked to be relieved from Presiding Judge and about six days later Judge Weinstein was appointed his successor. With this Dean told Benton and me yet another new reason why

he should be (or become) Chief Trial Counsel. He repeated it on other occasions to other members of the "AOPMC" and perhaps to others. The gist of it was, upon hearing that Judge Weinstein would be presiding, "This is good, because we have special relationship through our wives. Ellen and Mrs. Weinstein are personal friends and in fact Mrs. Weinstein called to tell her 'we're with you all the way' " or words of similar unmistakeable personal relationship. Not being from New York, I did not know if any of this was true or not. I do know that certain judges, state or federal, had favorites even to the point that they were oft times associated by counsel before that judge even though they had no expertise of other involvement or anything to offer other than the relationship. Parenthetically when my cousin was appointed a District Judge by President Carter I received several calls, one from an experienced criminal defense lawyer, seeking my association in a case which I had no knowledge of even though I had not practiced federal criminal law for several years before that. I declined the employment. In fact of two of my Plaintiffs' cases removed to his Court, I had both successfully remanded, and have disclosed the relationship on other occasions.

On one occasion after Court in Brooklyn, when we were in the restaurant across from the Court house on Cadman Plaza, Mrs. Dean (Ellen) was present, having been present in the Court that day. I openly criticized her for wearing a skirt so short it would have embarrassed my ten year old daughter. I also began, to David, and to others of the them "AOPMC" which was being constituted and again after the Court's recognition of all of us, questioned David's physical ability to be Chief Trial counsel. This was particularly noticeable at hearings which I

attended where he was presenting economic evidence of the financial status of the chemical company defendants.

I noticed, as did others of us, including lay persons, that he constantly moved his hands and arms, almost at times to the extent of one having mild delerium tremens. I constructively questioned him during the ensuing months whether he was able to physically go the 'route' of a lengthy trial as lead counsel, even though he would be spelled in parts by Ton Henderson, Neil Peterson, Benton Musslewhite and others of us in more minor roles. He always assured me he could. I even asked him once if he were on medications. This was based upon the foregoing observations of myself and others, his ability to work up to twenty hours at a time, his thin size, etc. At no time did I or any other member of the "AOPMC" ever question the physical or mental ability of any other player on our team to last the ordeal of this trial, other than respects David Dean.

Before John O'Quinn finally agreed to enter the case, he made it abundantly clear to Dean and all others that he personally would not participate to any extent except that of his financial contributions and perhaps hiring an attorney to participate. He said that he had too many personal trial commitments which he had to honor to enable him to participate personally. Dean readily agreed to this as he had done when I stated similarly to him early in the fall of 1983.

"LOBM", O'Quinn and I had a three way agreement respecting our additional financing of "LOBM" in addition to our committed $200,000.00 contribution to the "AOPMC" (later expanded to $250,000.00 because of financial necessity at the time of the execution of "THE AGREEMENT" as amended in late 1984).

My firm had advanced to "LOBM" $50,834.48 including to the old "Y&A" for which we were not reimbursed in the original opinion by the Court herein on or about January 7, 1984.

This was negated in the amendments resulting in "THE AGREEMENT" which Dean now seeks to judicially invalidate.

Additionally it favored Dean, Schlegel and Musslewhite in that it eliminated the freely negotiated and agreed upon "50/30/20". Formerly 50% of the hours were to be shared equally regardless of the hours spent; 30% were to be distributed in proportion to hours worked and the remaining 20% in accordance with special skill factors. The removal of this ratio and agreement inured especially to Dean's benefit more than any other member of the "AOPMC". Perhaps that is one reason he so quickly ratified and joined in it. As of December 13, 1984 there no longer was the urgency for Dean to act as there had been in December 1983 when the prosecution of the case lay ahead. None of the reasons of great urgency set forth by him at p. 7 of his Affidavit was present any longer. The Fairness hearings had been held and only the Judge's decision lay ahead. Behind him lay benefits invaluable to calculate. An appearance on McNeill-Lehrer, on CBS News, the media and network exposure making him a national celebrity in print and the visual media and no doubt substantially increasing his law practice to its now seven members. It is safe to say that such time, if paid for at commercial rates, would be in mid six figures or higher, that is, $500,000.00+. It is noteworthy that Professor Friedman does not discuss the ethical aspects of this part of this case, about which he is completely silent.

It is fair to say, in summation, that Dean alone monopolized the "AOPMC" in the media beyond all other eight members combined. And as to those it was only his trip to an isle in the West Indies for a week or more to unwind that resulted in media 'crumbs' being left for the other members.

The economics as presented by Dean are incomplete. Fairness requires me to give credit to Joe Covello for doing what has been done with the 'numbers' portion of this case. But, alas, there are glowing omissions:

1. Interest rates on Wall Street and in the New York and national banks they have what is called a prime rate of interest for the most creditworthy borrowers, usually Fortune 500 or better if privately held. During the pertinent time period of the $250,000.00 contribution by each of the six AOPMC members (and during their personal expenditure of $50,000.00+ in addition to this, largely unreimbursed, plus their recent contribution, including Schlegel but still not Dean's, of $10,000.00 each with which to pay the remaining $400,000.00 in bills owed by the AOPMC), the prime interest rates were approximately as follows:

1.	October 1983 - March 16, 1984	Prime rate = 11.0%
2.	March 16 - April 5, 1984	11.5%
3.	April 5 - June 7, 1984	12.%
4.	June 7 - June 26, 1984	12.5%
5.	June 26 - September 27, 1984	13.0%
6.	September 27 - October 22, 1984	12.75%
7.	October 22, 1984 - January 22, 1985	12.5%

8. January 22, 1985 - February 28, 1985	12.0%
9. February 28 - March 29, 1985	11.5%
10. April, 1985	11.0%
11. April, 1985	10.5%
12. May 17, 1985	10.0%

This is the lowest point of the prime in four years and is half of the high point during 1978-1979. Henry Kaufman, respected guru for Salomon Brothers has stated that he sees an upturn in interest rates beginning in the third quarter of 1985 which is one month away. But we will use the 10% current rate in computing the approximate interest paid by the six AOPMC members contributing their respective $250,000.00 plus recent self assessment of $10,000.00 each, with Stephen Schlegel now contributing and only Dean refusing to do so, no doubt because of ethical doubts about whether this is violative of DR 5-103(B) by giving lending attorneys a financial interest in the case, or perhaps because any return he might receive would be usurious. He proposes a very draconian and procrustean solution to the latter, i.e. pay *no interest back* on funds advanced at the greatest risk short of our purchase of the Brooklyn bridge from an alleged private owner (as reportedly has been done in the past hundred years of its existence).

The interest accrual, to date for all of the six contributing members of the "AOPMC" *at prime* would be in excess of $150,000.00 and even, at a prime rate of only 10% above, is accuring interest at $157,000.00 per year without the favorable benefit of compounding (their current total contribution to the AOPMC and excluding

their substantial payments for their own benefit and other members such as "LOBM", and our firm's advances for Allen Kline, Jr. and Margie T. Searcy) is $1,570,000.00 including their most recent self assessment of $10,000.00 each for seven members, except Dean.

Finally, the 'numbers game' of hourly rates is deficient in the following among other particulars:

1. It conveniently omits the 'disallowed' hours, particularly of our firm and O'Quinn's which in our case was 69% of the total. Even if these continue to be disallowed, they are still performed. O'Quinn's disallowance rate was almost 60% and both of our hourly rates, as well as all other members of the AOPMC was well below that in the real world. Our firm has furnished its corporate tax returns to the AOPMC and made our financial statements available in order to borrow from Riggs National Bank. Our gross fees for calendar year 1983 and 1984 are in the record before Magistrate Scheindlin at hearings this year. For 1983 our firm with only one recent law graduate associate employed for less than half of the total year and one lawyer grossed and reported for federal income tax purposes a gross of $1,250,368.89. For 1984 it declined largely due to Agent Orange expenditures of time and money to $1,093,024.81. By the hour, based upon an estimate of hours conservatively since no time records are kept on most matters, and applying strict billing requirements as this Court did here, it was estimated that between 1,250 and 1,500 billing hours accounted for this, or an hourly average of over $800.00 to $1,000.00 Pro bono work is not included, which in Texas, you must pay a fee to perform.

Thus Dean's red flag assertion that there would be rioting in the streets if the public ever discovered that our firm in fact "earned" $1,732.81 per hour (Dean/Covello Affidavit at p. 13) is unfounded. In fact the public would be much more readily outraged if they were to discover that a nationally prominent (now) lawyer could evade his contracts and solemn agreements on some technicality (alleged ethical considerations and the Code of Professional Responsibility which is to protect them, the clients and the public at large and not a sophisticated New York lawyer). Yet the public is bound by its Agreements.

In fact the hourly rates set forth, hypothetically and not based upon fact, of my six present colleagues on the AOPMC is in fact less than they actually in fact earn, in some cases by far. Modesty prevented John O'Quinn from answering the Court that in fact he earns more than the $100.00 per hour attributed to him by the Court here. In fact in one hearing in the 234th District Court of Harris County, Texas before Judge David West in December, 1982 it was correctly and accurately estimated that he earned almost $5,000.00 per hour. Further he works double the hours which I do in part because of his younger age and few if any diversions from the practice of the law. And he earns a substantially higher rate than I do. If this Court discourages lawyers of the high calibre of John O'Quinn from ever accepting another class action case, even to principally assisting in its financing, the public at large has lost an able advocate.

2. The 'redistribution' which Dean seeks judicial approval of, ignores the further realities of the real world viz a viz income taxes. Professional corporations are taxed

at 46% after the first $25,000.00 net income. Individuals quickly attain a 50% bracket depending upon their marital status and other facts.

Thus, if Dean's scenario were followed, our firm would receive its $29,145.00 fee, pay a tax of 46% thereon and have remaining $15,738.30. But wait, that doesn't end the inquiry. They are paying interest at prime of 10% on $260,000.00 or $26,000.00 per year on their contribution. And they have paid during the past interest at prime rates (scheduled at page 15) of $25,562.50 approximately, to date. Thus their net effect is:

1. They have not been compensated at all for more than 600 hours expended by their then three members and associates.

2. They are being awarded only $100.00 per hour for some 291 hours (when in fact they earned, reported and paid tax at an hourly rate actually earned and collected exceeding $800.00 per hour during 1983 and $500.00 per hour in 1984) the reduction due to the impact of Agent Orange and an auto accident in January, 1984 in which I was involved.

3. After payment of interest at even prime rates, they have an actual deficit to date after tax of ($9,824.20)—($15,738.30 net after taxes—$25,562.50 interest paid on $260,000.00 contributions to AOPMC).

4. They are paying an annual interest charge of 10% prime of $26,000.00 additional per year until collection is made.

5. They will not be able to deduct the $260,000.00 except as a capital loss limited to $3,000.00 per year if no recovery is made (other than to offset low taxed

capital gains, if any, which professional corporations usually don't have).

6. Inflation is not accounted.

The toll has not only been financial. Our practices too were seriously impacted.

Last, but not least, their lives and those of the present AOPMC members are continually threatened, usually by a demented veteran, Randall Myers of Houston, who as recently as this March has threatened the members that "if the Judge signs the order approving the settlement, he is at the same time signing the death warrant for each member of the Committee." This was conveyed to me as recently as April 19, 1985 by the U.S. Marshals in Brooklyn. I was the only one singled out by name, a most comforting thought.

Dean does not isolate the effect upon other AOPMC members because he knows that most in fact earn more than "NBSPC"; yet he seeks to disrupt the share of all members of "AOPMC" by his Motion to Invalidate his own agreement, which he induced us to sign and promised the very reward and return which he not seeks to invalidate. I think there are principles such as equity, estoppel, bad faith and others which will apply to answer his motion in the arbitration proceedings which must be held and govern it.

And how he preserved his own role in this case rather than be ousted by Peter Johnson. At that time and place we of the AOPMC will answer his allegations about the ethical considerations which he has so recently embodied, as well as what are reasonable as attorneys fees and if Dean can profit by his own fraud, deceit, and the like

and attempt to change position on a binding effective contract.

These and other factors are reserved for the binding arbitration proceeding. If "THE AGREEMENT" is unethical, usurious or violative of a Code of Professional Responsibility as alleged which is denied, the facts of Dean's causing it to be executed and inducing investors into it will be brought out, including but not limited to the very statements from the Bench by Judge Weinstein that the '3-1' return was for the risk factor not otherwise awarded, i.e. that counsel had and were being awarded their 3-1 return on their funds invested as a 'fait accompli'. At pp. 31 - line 20 to 32 - line 12 the following colloquy occurred between the Court and David Moyer of the "AOPMC":

"THE COURT: Did your firm put any cash in this case?

MR. MOYER: Yes, Your Honor.

THE COURT: How much?

MR. MOYER: All told, close to $300,000.00.

THE COURT: Well, you're going to get triple your $300,000.00 so that's $900,000.00 plus you'll get a large part of which I gave you, what was it, about $350,000.00, what did I give you?

MR. MOYER: $296,000.00 Your Honor.

THE COURT: You'll end up with a lot of that, so you'll probably end with over $1,000,000.00 out of the case, and considering all of the factors it seems to me that I haven't been unduly harsh with your firm, but I

may have been. I mean, you know, if you began to look at every little item, you could say we should have gotten this and we shouldn't have gotten this, but you can't do it with a case that big. So take it up with the Magistrate. I don't have any feeling that I've hurt your firm unduly. You'll come out of this thing pretty well, better than you could have expected . . ."

This scenario was repeated with later. See e.g. at pp. 34 where the Court included the effect of the 3-1 multiplier in estimating that the total fees awarded would approximate $10 million. And as stated above, (at pp. 79-81 of the Feb. 6, 1985 hearing) Benton Musslewhite acknowledged repeatedly that "I stand by any Agreement I signed" and that he certainly thinks that the people (AOPMC members) who put up their money are entitled to their multiplier even though the impact upon him was to reduce his award to only $70,000.00 which he agreed to absorb. Were this a normal stock sale or similar investment, Dean would find himself under complaint for his acts and omissions with knowledge and intent to have personal gain therefrom, which he obtained.

Other members of the AOPMC will supply their own Affidavits regarding their knowledge of the facts herein.

WHEREFORE, your Deponent respectfully requires that the relief sought by Dean be denied in its entirety, and that their Motion to Compel Arbitration be granted, together with such other and further relief as to this Court may seem just and proper.

/s/ NEWTON B. SCHWARTZ
Newton B. Schwartz

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 31st day of May, 1985.

/s/ BARBARA WILMUTH
Notary Public in and for
The State of Texas

My Commission expires: 2/12/86

EXHIBIT D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 85-6365

(Filed July 1, 1987)

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of July one thousand nine hundred and eighty-seven

IN RE: "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee—NEWTON B. SCHWARTZ

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

No. 87-378

Supreme Court, U.S.
FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

sub nom. NEWTON B. SCHWARTZ., P.C. et al. and
JOHN M. QUINN, P.C. et al.,

Petitioners,

vs.

DAVID DEAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Hempstead, New York 11550
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Counsel for Respondent
Attorney of Record

QUESTIONS PRESENTED

1. Was the Court of Appeals for the Second Circuit correct in holding that a fee-sharing arrangement (under which attorneys would be paid on the basis of a multiple [300%] of money advanced for expenses) was invalid when it had the effect of awarding one counsel twelve times the amount that the district court held he was entitled to on the basis of his actual legal services contributed.

2. Was the Court of Appeals correct in holding that a fee-sharing arrangement in a class action suit was invalid when it totally distorted the lodestar approach to fee awards by awarding counsel three times the amount they advanced for costs regardless of their actual legal contributions to the case.

3. Was the Court of Appeals correct in holding that a fee-sharing arrangment in a

class action suit was invalid under which counsel was paid on the basis of a multiple of costs advanced since it created potential conflicts with the class by encouraging counsel to settle at the earliest possible moment as soon as their return on their investment was guaranteed, even if the class might do better if the case went to trial.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-378

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

sub nom. NEWTON B. SCHWARTZ., PC. ET AL
and JOHN M. QUINN, P.C. ET AL,

Petitioners

v.

DAVID DEAN,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Preliminary Statement on Non-Relationship Among Various "Agent Orange" Cases.

This case is one of ten separate appeals decided by the Second Circuit Court of Appeals growing out of the "Agent Orange" product liability litigations (reported at 818 F.2d 145, 179, 187, 194, 201, 204, 210,

216, 226, and 821 F.2d 139), in six of which Petitions for Certiorari have been filed in this Court. Although all of the cases bear the same name, they are not legally dependent on each other in any way, and each reported decision involves different parties and distinct and independent legal issues. Thus a grant of certiorari in one case (or a decision to defer the grant) should in no way affect a decision whether to grant certiorari in another, and, in particular, in this case.

Thus the appeal by Dow Chemical Co. (Dow Chemical Co. v. Ryan, No. 87-224, reported at 821 F.2d 139) involves the unsealing of certain discovery materials from a protective order entered by the District Court early in the litigation. A second appeal (Adams v. United States, No. 87- , reported at 818 F.2d 201) involves a suit by wives and family members of Vietnam veterans directly against the United States under the Federal Tort

Claims Act, which was dismissed on the basis of the Feres doctrine (United States v. Feres, 349 U.S. 135 (1950)). A third case (Hogan v. Dow Chemical, and Fraticelli v. Dow Chemical, No. 87-438, reported at 818 F.2d 210) involves an appeal by a civilian doctor and certain civilian residents of Hawaii whose cases were dismissed on procedural grounds or because of the discretionary function exemption of the Federal Tort Claims Act. A fourth case (Lombardi et al. v. Dow Chemical, No. 87-436, reported at 818 F.2d 187) involves the dismissal of the claims of veterans who had opted out of the class action against the chemical companies. A fifth case (Pinkney et al v. Dow Chemical, No. 87-437, reported at 818 F.2d 145) involves a challenge to the settlement between the veteran class and the chemical company defendants.

The final appeal involves the instant case, a challenge by two lawyers to the invalidation by the Second Circuit of a fee sharing arrangement previously entered into by the nine members of the Plaintiffs' Management Committee, on the ground that the arrangement totally distorted the appropriate fees to be paid to class counsel and otherwise could create a conflict between counsel and members of the class.

It is clear by the brief description of the cases -- and will surely be apparent by review of the Petitions themselves -- that this Court's disposition of any petition for certiorari will not effect the decision whether or not to accept another case for review and should in no way affect the decision on this Petition.

Background

This appeal involves the validity of a fee sharing arrangement entered into by nine

members of the Plaintiffs' Management Committee (PMC), the managing attorneys representing the veteran class in the litigation against the chemical companies manufacturing the chemical product "Agent Orange," a defoliant used in the Vietnam War containing dioxin. (Although there were nine members of the PMC and seven sought to upheld the validity of the agreement below, only two members of the PMC, Newton Schwartz and John O'Quinn, are seeking to appeal the Second Circuit decision to this Court). That case was eventually settled for $180,000,000 (818 F.2d 145) and the reasonableness of that settlement, upheld by the Circuit Court, is before the Court in another matter, No. 87-437.

The fee sharing arrangement was entered into in December, 1983 at a time when funds were needed to maintain and continue the law suit, with trial imminent. David Dean,

respondent here, had been a member of the original panel of class counsel, and had been closely involved with the Agent Orange litigation since its inception in October, 1979 and was appointed to the PMC in 1983. He was also appointed lead trial counsel by the district court in October, 1983 and court spokesman for the PMC.

In light of the need for new counsel and funds to prepare the case for trial, the PMC was expanded in the fall of 1983 to nine members. Six additional counsel came into the case and joined the PMC, each agreeing to contribute (more precisely, to invest, as explained below) up to $200,000 (later increased to $250,000) to the PMC to cover necessary expenses of the litigation. But they insisted as a condition of their contributions that they would get a "three for one" return on each dollar contributed for expenses, which would be paid out of the

total pool of attorneys' fees awarded to PMC members upon successful completion of the action (818 F.2d at 218; Petition for Certiorari 4a-5a). 1 In other words, each attorney investing $250,000 for expenses would obtain $750,000 off the top of the total attorneys' fee pool awarded to the PMC, amounting to a net profit of $500,000, regardless of the hours he put into the case. In addition, the remaining portion of the fees would be divided on a 50-30-20 ratio

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1 The original December, 1983 agreement also provided that that the fees remaining after the "three-for-one" investment payouts would be divided on a 50-30-20 percent formula: 50% would be equally divided among the nine PMC members regardless of the time each put into the case; 30 percent would be distributed according to the number of hours each member expended in the case and the final 20% would be divided in acccordance with certain quality and risk factors. As explained below, when the district court later expressed reservations about the 50-30-20 formula, the PMC members revised their agreement (in December, 1984) to eliminate that portion of the fee-sharing arrangment, and at the same time increased the contribution level for the original investors from $200,000 to $250,000. (818 F.2d at 218; Petition at 6a).

based on other factors (described above in footnote 1).

Less than six months thereafter, in May, 1984, the chemical company case was settled for $180,000,000. Counsel then made their application for counsel fees to the district court in September, 1984 and first disclosed the existence of the fee sharing arrangement to Judge Weinstein at that time; he expressed doubt about the propriety of the 50-30-20 formula which was then eliminated by counsel in the revised agreement. 2

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2 Petitioner Schwartz makes the absurd allegation that he had previously advised the court of the agreement in September, 1983 before the arrangment had been negotiated and signed. He alleges that he spoke to Special Master Sol Schreiber who had been appointed by the previous trial judge assigned to the case, then District Court (now Circuit Court) Judge George C. Pratt (who was succeeded by Judge Weinstein in October, 1983). Petitioner claims that he spoke to Special Master Schreiber about the matter in September, 1983 who advised counsel (1) to get the money from a bank rather enter into any "investment" scheme, and (2) not to tell Judge Pratt about it. (Petition for Certiorari at 5, 60a). On the face of it, the claim is an absurdity and internally inconsistent. The Special Master's

In January, 1985, the district court issued its opinion on counsel fees (reported at 611 F. Supp. 1296), granting a total of over $10,000,000 to all counsel and over $4.7 million to members of the PMC. The court awarded $1,424,283.75 to Respondent David Dean, granting him $150 per hour for 6,330 hours over five years, finding that he had displayed "an extraordinary level of skill and excellence" and merited a quality multiplier of 1.5. (611 F. Supp. at 1333). By contrast, Petitioner Newton Schwartz was awarded $41,886 for about 400 hours ($100 per hour with no multiplier). The other

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direction that the money should be borrowed from a bank can only be construed as advice that an investment arrangement whereby fees would be based on contributions could be viewed as improper. In any event, any informal exchange with the Special Master before the agreement was finally negotiated and signed could hardly be viewed as "disclosure" to the court. Petitioner had every opportunity to bring the final agreement before Judge Weinstein to determine its validity before any substantial portion of the money was actually contributed and spent.

Petitioner here, John O'Quinn, was awarded $132,576, also at the minimum rate of $100 per hour. The court commented as to both attorneys that they were never "particularly active" in the case, with most of their firm's work being done by associates. 611 F. Supp. at 1332-33.

Enforcement of the fee-sharing arrangement, however, would dramatically shift these amounts, as shown by the following chart, accepted by the court below (Petition, 8a) and the parties as accurately describing the effect of the agreement (the first three attorneys were noninvestors who would have to give back a significant portion of their fees and the latter six were investors who would obtain the "three for one" return):

	Amt of fees awarded by dist. ct	Amt of fees awarded under Agreement	Net effect of the Agreement
Dean	$1,424,283	$542,310	-$881,973
Schlegel	944,448	393,312	-$549,136
Musselwhite	344,657	206,991	-$137,666
Schwartz	41,886	513,026	+$471,140
O'Quinn	132,576	541,128	+$408,552
Brown	348,331	608,162	+$259,831
Locks	487.208	651,339	+$164,171
Chesley	475,080	647,534	+$172,456
Henderson	515,163	659,975	+$144,812

Looking at the hourly rates, the effect of the fee sharing arrangement would mean that Dean's hourly rate would be reduced from $225 per hour ($150 per hour plus 1.5 quality multiplier) to $85 per hour. And Petitioner Schwartz' hourly rate would be increased from $100 per hour to $1,224.00 per hour, while Petitioner O'Quinn's rate would go from $100 per hour to $408.16 per hour.

Proceedings Below:

In May, 1985, Respondent Dean moved to set aside the fee sharing arrangement on the ground that the arrangement totally distorted the fees payable to class counsel, violated

professional ethics and did not protect the rights of the class. In a decision issued on June 27, 1985, (reported at 611 F. Supp. 1452) the district court denied Respondent Dean's motion and upheld the agreement. It held that in this case there had been no conflict of interest between counsel and the class and the settlement was a fair one.

The district court based its decision on a finding that there was no violation of DR 2-107(A) which prohibits an attorney from splitting a fee with another attorney, since it viewed the PMC as an "ad hoc law firm," and the business realities of law practice in this type of case required a more flexible approach to the ethical requirements. The court also rejected the argument that the lawyers had acquired a "proprietary interest" in litigation which was prohibited by DR 5-103. It held that the investing lawyers did not have a proprietary interest in the case

as such but only in the final attorneys' fee pool paid to class counsel. The court also found that there was no conflict between counsel and the class since any incentive to settle early by the investor-lawyers (so that they could get their investment plus profit back at the earliest possible moment) would be offset by the noninvesting attorneys who had an interest in prolonging the litigation in order to obtain maximize fees under a lodestar formula. In this case, the court found that the settlement was fair and therefore any theoretical conflict between counsel and the class did not have any adverse effect on the outcome. In any event, the fact that the court was required to oversee the settlement prevented any abuse.

Recognizing that agreements of this kind could affect the fairness of settlements in class actions in the future, the District Court ordered that local Civil Rule No. 5 of

the Eastern District of New York should be amended to require class counsel to inform the court of any fee-sharing arrangements as soon as they are entered into, in order to minimize the possibility of conflict between counsel and the class.

On appeal, the Second Circuit reversed. The Court of Appeals found that fee-sharing arrangements of this kind so totally distort the calculation of reasonable fees payable to class counsel that they cannot be upheld. It noted that tying the fee to the amount advanced for expenses "completely distorted the lodestar approach to fee awards." 818 F.2d at 222, Petition 14a. The basic method of calculation of attorneys' fees in class action, equitable fund cases is the "lodestar," under which the number of hours reasonably expended is multiplied by the reasonable hourly rate. The only basis for adjusting the lodestar upwards, the Court

said, is because of the exceptional quality of an attorney's work. However, to adjust it upwards by a multiple of twelve (Schwartz' award of $41, 886 increased to $513,026) and to decrease the reasonable fee to Dean by two-thirds because money was invested in the lawsuit at a "three for one" return was to totally undermine the lodestar method. It would award "windfall fees" and in any event, would give the "appearance of having done so," prohibited by the case law on equitable fund cases, 818 F.2d at 222, Petition at 13a, quoting from City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

The Court of Appeals also found that arrangements of this kind created a serious potential for conflict with the rights of the class whom counsel was representing. The court noted that investing attorneys had the greatest incentive for settling early, regardless of how the settlement would affect

the interest of the class. "Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor attorney will be disinclined to undertake the risks associated with continuing the litigation." 818 F.2d at 224, Petition at 17a.

The fact that the court would be required to assess the overall reasonableness of the settlement does not sufficiently protect the interests of the class against possible abuses of this kind of arrangement, the Court said. "The test to be applied is whether, at the time a fee-sharing arrangement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed." 818 F.2d at 224, Petition at 18a. At the end of the case when only the fairness

of the settlement is under review, it is too late to determine whether the process by which the settlement was reached was fair to the class and whether class counsel were motivated by other considerations in approving the settlement. "The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement." 818 F.2d at 224, Petition at 18a.

In addition, courts must consider "the potential public misunderstanding they may cultivate in regard to the interests of class counsel," 818 F.2d at 225, Petition at 20a. The fact that individual members of the class of Vietnam veterans will get a relatively small amount but that one counsel would receive over twelve times the amount that the district court found his services were worth "provides additional justification for invalidating the agreement and applying the

lodestar formula," 818 F.2d at 225, Petition at 20a.

Summary of Argument

There is absolutely no basis for the grant of certiorari in this case. The fee-sharing arrangement at issue here involves such an idiosyncratic fact situation that it is impossible to imagine a similar pattern arising again. There is no "conflict" among the circuits on this issue since this kind of arrangement has never been examined by any court anywhere and the existing case law on other types of fee-sharing agreements is not remotely relevant.

Furthermore, the Court of Appeals was obviously correct in holding that attorneys' fees should never be based upon the "investment" that a lawyer makes in a law suit since it would totally distort the proper method for determining a reasonable

attorneys fee. Finally the court was correct in pointing out the potential conflict which such arrangements create with members of the class, whose interests the attorneys are obliged to protect.

ARGUMENT

POINT I

THERE IS NO CONFLICT IN THE CIRCUITS WITH RESPECT TO THE LEGALITY OF FEE-SHARING ARRANGEMENTS OF THE KIND AT ISSUE HERE

The chief basis for requesting certiorari in this case is that the decision below allegedly creates a conflict in the circuits, in particular, with the Third Circuit decision in Lindy Bros. Builders, Inc v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973)("Lindy I"), on remand, 382 F. Supp. 999 (E.D. Pa. 1974), appeal after remand, 540 F.2d 102 (3d Cir. 1976)(en banc)("Lindy II"). Petitioners support this assertion only by selective

citation from the case and by failing to describe the actual holding.

Lindy II did not involve a fee-sharing arrangement under which attorneys would share their fees based upon a multiple of the costs or expenses contributed to the case. Indeed, no case has been found or cited by any party or by the courts below in which lawyers agreed to share fees based upon that consideration.

In Lindy II two law firms (the Berger firm and the Kohn firm) had agreed to split the total fees paid to them on a 50-50 basis. A group of previously unrepresented claimants who were required to contribute to the attorneys' fee fund objected to award of any amount to the Berger firm since the district court had originally concluded that it was entitled to only $139,000 for the fair value of its services but would get $893,000 under a new calculation of fees. However, the

increase in fees was not due solely or significantly to enforcement of the 50-50 agreement. Rather the increase was due to the fact that certain private clients benefited by the settlement were to contribute $861,191 directly to the attorneys' fee pool (see 540 F.2d at 108, 382 F. Supp. at 1028, n. 34). In addition, the district court recalculated the value of the services performed by the Berger firm, noted the valuable contribution it had made in consultation and review with the Kohn firm and held that higher amounts requested were justified. 540 F.2d at 109.

That holding -- which simply reapplied the basic lodestar method of calculating a reasonable fee and emphasized that the fee must be based on the reasonable value of the legal services contributed toward successful resolution of the case -- does not in any way conflict with the holding of the Second Circuit below which held that fees cannot be

based primarily on the financial investment made by a lawyer in the case.

The other district court cases cited by the Second Circuit and cited by Petitioner stand for the uneventful proposition that after the basic lodestar method determines the final fees to a group of attorneys, some finetuning and adjusting of the final fees may be made among the attorneys working on the case to more accurately reflect their contributions to the final outcome so long as the adjustment and the final fees paid to each attorney is close to the lodestar amounts established by the court and reasonably reflects the value of their legal services to the case. 3 Thus the Court below explained:

3 The cases cited include: Ruskey v. Jensen, No. 71-3169, slip opinion at 10-13 (S.D.N.Y. Sept. 18, 1981); In re Magic MArker Securities Litigation, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) Par. 96,116 at 96,195 (E.D. Pa. Sept. 16, 1979); Valente v. Pepsico, Inc, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) Par. 96,921 at 95,863

> A careful examination of those decisions permitting internal fee agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of these cases the courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. 818 F.2d at 223; Petition at 15a

The Court below concluded that any fee sharing agreement "must comport with those principles of fee distribution set forth in Grinnell I and Grinnell II." 818 F.2d at 223; Petition at 16a. In another words, a fee-sharing arrangement between counsel that deviates slightly from the lodestar established by the court may be permissible under some circumstances when the lawyers involved try to more accurately gauge the value of their services to the case, but it "must bear some relationship to the services

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(D. Del. June 4, 1979), appeal dismissed, 614 F.2d 772 (3d Cir. 1980); In re Ampicillin Antitrust Litigation, 81 F.R.D.395, 400 (D.D.C. 1978); Del Noce v. Delyar Corp., 457 F. Supp. 1051, 1055 (S.D.N.Y. 1978).

rendered," and not to the investment of money. Ibid.

No case anywhere holds to the contrary and thus there is no conflict in the circuits to justify the grant of the petition here.

POINT II

A REASONABLE FEE CANNOT BE BASED UPON A LAWYER'S INVESTMENT IN A CASE.

The one aspect of the Second Circuit's opinion which is not even mentioned by the Petitioners is the holding that the fee-sharing arrangement at issue here is improper because it "completely distorted the lodestar approach to fee awards," 818 F.2d at 222; Petition at 14a. 4 In equitable fund cases,

4 Rather than discuss this issue, Petitioners emphasize their erroneous assertion that disclosure was made to the court through the apparently informal discussion with the Special Master before the agreement was finally entered into. Aside from the fact that this assertion is internally inconsistent, as explained above, and cannot bear the weight Petitioners would give it, it

an attorney who creates a fund for the benefit of a class "should receive reasonable compensation from the fund for his efforts." Ibid. Under the Second Circuit rule in Grinnell II, the determination of the fee is based upon the "actual effort made by the attorney to benefit the class," Grinnell II, 560 F.2d at 1099.

To measure that effort it is necessary to make an evaluation of the legal services contributed by the attorney, which in turn is measured by the number of hours he reasonably expended in the successful outcome of the case multiplied by his reasonable hourly fee. It cannot be based on the money he invested, since that would make lawyers "insider traders" with a vengeance inasmuch as outsiders (both civilians and

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has absolutely no bearing on whether the fees were unreasonable because of their distorting effect on the lodestar. Thus the assertion about disclosure, as feeble as it is, has no effect upon this aspect of the Court's decision.

nonlitigating lawyers) would commit a crime if they attempted to invest in such a suit. See N.Y. Judiciary Law, Sect. 478 et seq. (criminal prohibition on champetry). See also DR 3-102(A)(lawyer shall not share fees with nonlawyer).

In setting the fees in this case, the court below carefully examined counsels' fee petitions and arrived at individual awards based upon the proper Grinnell factors and by evaluating the services each had provided for the class. But the threefold return of advanced expenses tototally distorted and made meaningless consideration of the individual fee petitions. The lodestar requirement is established not only to determine what the clients and the class should pay as a total fee, but what each individual attorney should receive for his services. As the Court said in Grinnell II, 560 F.2d at 1098: an attorney should be

"compensa[ted]... for the reasonable value of services ...benefitting the claimant."

Petitioners claim that their contribution of funds was very important in leading to the successful outcome of the case and that the amount of out-of-pocket expenses advanced for the litigation should be considered in increasing the lodestar. Petition at 17. That assertion is a non sequitur. It is for the court to evaluate the services rendered by an attorney and the whether an increase in the lodestar is justified based on the advance of expenses, not the attorneys enforcing a private agreement that totally distorts the fees and creates serious risks of conflict with the class. And no court has ever held that the "services" contributed by an attorney which justifies an increase in the lodestar should include the money he invested in the case or that the lodestar could be increased

twelvefold for one attorney because of that investment.

POINT III

THE FEE SHARING ARRANGEMENT CREATED THE POTENTIAL FOR A SERIOUS CONFLICT OF INTEREST WITH THE CLASS AND MUST BE INVALIDATED ON THAT BASIS

The alternate holding of the Court below was that the fee-sharing arrangement created a clear potential for conflict of interest with the class members. This is expecially true in a class action case where full disclosure to the "client" and consent is difficult and frequently impractical to obtain.

In this case, at the time the agreement was entered into, there was a strong "potential for abuse [which] should have been discouraged." 818 F.2d at 224; Petition at 17a. The court explained:

> The conflict obviously lies in the incentive provided to an investor-

> attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. 818 F.2d at 224; Petition at 17a.

Those risks are not mitigated by the supervision that the court exercises over approval of the settlement. At that point when the case is virtually over, the court cannot reexamine the process by which the settlement was arrived at to determine the effect of the fee-sharing arrangement. At that point it would be difficult to determine whether class counsel had fulfilled its obligation to the class or the extent to which counsel had allowed their own interests to influence their decision to accept a settlement. The pressure to accept the settlement at that point is considerable and other administrative concerns make it difficult for the court "to assure that the

ongoing intersts of the class are protected." 818 F.2d at 224; Petition at 19a.

Contrary to Petitioners' assertion, the current situation is totally different from the common contingency fee arrangement which is specifically sanctioned by DR 5-103. When an attorney agrees to accept one-third of the total amount secured in a case, both the attorney and the client have the same incentive to achieve the highest possible verdict or settlement. But here that is not true. So long as the settlement covers the investment and the promised return, the attorney is less interested, if he is interested at all, in getting more money for his client, the class or in "undertaking the risks associated in continuing the litigation." 818 F.2d at 224; Petition at 17a-18a.

The current system for determining a reasonable fee for an attorney contains

built-in incentives for insuring that the attorney will obtain the best results for the class. The current multiplier factors put a premium upon lawyers taking cases without bright prospects, doing the highest quality legal work, and getting the best results. If that is accomplished, an attorney can get quality and result multipliers, to the benefit of himself and his clients. But a fee- sharing arrangement based on a promised return on investment destroys the incentive for both the investor and noninvestor lawyers by making decisive the amount of money contributed and not the effort and quality of work of the attorneys. As the Fifth Circuit said in Zylstra v. Safeway Stores, 578 F.2d 102, 104 (5th Cir. 1978): "[W]henever an attorney is confronted with a potential for choosing between actions which benefit himself financially and an action which may benefit the class which he represents, there

is a reasonable possibility that some specifically identifiable impropriety may occur." A court cannot wait to deal with that impropriety on a case by case basis, but must discourage arrangements that will create a substantial liklihood that conflicts may arise.

The fee-sharing arrangement raises substantial ethical problems under both DR 5-103 (prohibiting an attorney from acquiring a proprietary interest in litigation) and DR 2-107(A) (prohibiting fee-splitting with lawyers in another firm).

It is difficult to see how this investment of money is anything other than the acquisition of a "proprietary interest" in a case, prohibited by the ethical rule. Moreover, the fee splitting arrangement here is far worse than the typical "forwarding fee" payment long condemned by the rules. In a forwarding fee situation a lawyer often

contributes guidance, assistance and client hand-holding, uniquely legal functions that advance the case. But fee splitting based only on investment has no such redeeming features and does not involve any legal service.

CONCLUSION

Invalidation of the fee-sharing arrangement by the Court below created no windfall for any attorney, but only leaves each attorney precisely in the position that the courts below determined their efforts were worth under traditional lodestar analysis. It is the Petitioners who extracted onerous conditions for their investments and now seek to make a windfall after they contributed virtually nothing in the way of legal servies to the case. The decision below

was eminently correct and should not be examined or disturbed.

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